THE

STATUTORY TESTAMENTARY LAW

OF

MARYLAND,

WITH THE

DECISIONS OF THE COURTS THEREON

EXPLANATORY OF THE SAME.

BY CLEMENT DORSEY,

One of the Associate Judges of the First Judicial District of Maryland.

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TO THE MEMBERS

OF THE

GENERAL ASSEMBLY OF MARYLAND,

OF THE SESSION OF 1832.

This work is dedicated to you, as a tribute of respect for that enlightened policy, which induced you to extend the patronage of the state, to a compilation, the professed object of which was to gather together, under appropriate titles, in one volume, the statutes of our own state on testamentary affairs, and the construction given to the same by our judicial tribunals; thus placing within the reach of our citizens the means of acquiring a knowledge of that law so vitally affecting the interests of all of our people.

The General Assembly having thereafter deemed it expedient, to authorize a revision of the laws of this state, and the executive having selected the agents to do the work, it was essentially requisite to my interest to suspend this compilation until a revised code should should be reported and adopted. The resolution authorizing the revision, having been rescinded at the last session, this work has been put to the press as early thereafter as my judicial duties would permit.

To separate and distribute under appropriate titles, a legislation, so intermingled, as that of our state is, on testamentary matters, required very minute examination, and much intellectual labour, yet I have no doubt, that I have been guilty of some incongruous classification, impossible to be guarded against in a first edition.

To render this work the more instructive to the judges of the orphans court, I have incorporated all of their duties, even those not of a testamentary character.

I have the honour to be

Your obedient servant,

C. DORSEY.

July, 1838.

TO THE READER.

In the Appendix will be found those portions of the Act of 1798, chap. 101, which have been repealed, but which are in force in the District of Columbia.

I cannot account for the omission of the first and second sections of sub chapter 10, chapter 101, of 1798, which ought to have been printed on page 103, as I have there inserted all the decisions on these sections. These sections will be found in the appendix, page 153, and are referred to in the index.

I have discovered only one other omission, that of the twelfth section of sub chap. 14, of chap. 101, 1798. This section authorizes an administrator, with the approbation of the court, to appoint a day to make distribution among creditors and distributees. It will be found on page 153.

To Messrs. Ridgate, Gwynn, Johnson, Scott, Glenn, Raymond, and Lee and Jenkins, of the Baltimore bar, and to Mr. Perine, I tender my thanks for the use of their libraries, and to Mr. Cooke, for the loan of the records of the trials growing out of Mr. Randolph's will.

In the opinion of some, a more imposing form might have been given to the mechanical part of the work, by printing it with a larger type and on a smaller page—yet as it contains all the matter which is to be found on the various subjects on which it professes to treat, it can be a cause of no regret, except to the over-fastidious, that it assumes the present condensed shape.

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THE

STATUTORY TESTAMENTARY LAW

OF MARYLAND.

CHAPTER I.

THE ORPHANS COURT.

ITS ORIGIN, PROGRESS, AND PRESENT ORGANIZATION.

Historical view.

THE act of 1641, chap. 3, vested in the lieutenant-governor, for the time being, jurisdiction over testamentary matters, a prerogative court was afterwards established, and a judge thereof appointed, who was styled 'the judge or commissary-general for probate of wills, and granting administration.' The act of 1715, chap. 39, sec. 2, directed that he should 'proceed therein according to the laws of England now in force, or to be thereafter in force, within twelve months after such laws shall be published in Great Britain, if pleaded before him, saving in such cases as is provided by this act; and that it shall and may be lawful for the judge for the probate of wills to take the probate, or caused to be proved any last will and testament within this province, although the same concerns title to land.'

An appeal was given by sec. 27 of this act, from the sentence of the commissary-general to the chief governor of the province, for the time being, and upon the petition of the appellant, a commission of review might issue to such person or persons as the governor might appoint. This act further directed that the commissary-general should appoint deputies for each county, and gave to them a restricted testamentary jurisdiction.

The above system remained in force until 1777, when the legislature, by the act of February session of that year, chap. 8, abolished the office of commissary-general, and directed that

Historical view.

'seven of the justices of the peace should be commissioned as justices of the orphans court, in and for each county,' 'that they should administer justice in testamentary matters according to the laws now in force, or hereafter to be in force for the administration of justice in testamentary affairs, granting of administrations, recovery of legacies, securing filial portions, and distribution of intestates' estates; and shall have the same power, authority and jurisdiction within their several counties, which the commissary-general heretofore had and exercised within this state.' The number of justices of the orphans' court by the act of 1791, chap. 76, was reduced to three.

In 1796, the House of Delegates adopted a resolution inviting the honourable Alexander Contee Hanson, the then chancellor of Maryland, to digest and report a code of testamentary law. He accepted the invitation, and reported a system, which was adopted by the General Assembly, with some important alterations; this is the act of 1798, chap. 101, entitled, 'An act for amending and reducing into system the laws and regulations concerning last wills and testaments; the duties of executors, administrators and guardians; and the rights of orphans and other representatives of deceased persons.'

The preamble recites, 'Whereas the laws and regulations, relative to the estates of deceased persons, comprehending a variety of subjects, and interesting to citizens of every description, have not only become complicated and difficult to be understood, but are found by experience to be greatly inadequate to the purposes for which they were framed.'

The second section provides, 'that every provision, rule, or regulation contained in any act of Assembly heretofore passed, or in any English statute used or practised under in this state, which is inconsistent with, or repugnant to, any thing contained in this act, be and it is hereby repealed and rendered utterly void and of no effect.'

Chancellor Kilty, in his compilation of the Laws of Maryland, in a note appended to the act of 1715, chap. 39, says, 'that the whole of this act is, on a careful examination and comparison, deemed to be inconsistent with, and repugnant to the act of 1798, chap. 101, and therefore repealed by the preceding section.'

In reference to the act of February session, 1777, chap. 8, he says, 'this act, and every other act in addition thereto, or so much thereof, as is repugnant to the provisions of the act of 1798, chap. 101, is repealed by the second section thereof; this act, although inserted at length in this compilation, is not in force, except such parts thereof as do not come within the said repealing clause.'

CHAPTER II.

ORPHANS COURT.

HOW APPOINTED, AND OF THE JURISDICTION AND DUTIES THEREOF.

An Act for amending, and reducing into system, the laws and regulations concerning last wills and testaments, the duties of executors, administrators and guardians, and the rights of orphans and other representatives of deceased persons.—1798, *ch.* 101.

Preamble. Whereas the laws and regulations relative to the estates of deceased persons, comprehending a great variety of subjects, and interesting to citizens of every description, not only are become complicated and difficult to be understood, but are found by experience to be greatly inadequate to the purposes for which they were framed:

Every former provision, &c. repealed. II. *Be it enacted by the General Assembly of Maryland*, That every provision, rule or regulation, contained in any act of assembly heretofore passed, or in any English statute introduced, used, or practised under, in this state, which is inconsistent with, or repugnant to any thing contained in this act, be and it is hereby repealed, and rendered utterly void and of no effect.

Rules, &c. to be the law of the land. III. *And be it enacted*, That the following rules, orders and regulations shall be taken, held and considered, in all courts, tribunals, and offices, and by all judges, justices and officers in this state, to be the law of the land.

Orphans court. 1. The governor, by and with the advice and consent of the council, shall have authority to appoint and commission three men of integrity and judgment in each county of the state, to be justices of the orphans court in such county, for the purpose of taking the probat of wills, granting letters testamentary and of administration, directing the conduct and settling the accounts of executors and administrators, securing the rights of legatees, superintending the distribution of the estates of intestates, securing the rights of orphans and legatees, and administering justice in all matters relative to the affairs of deceased persons, according to law.—*Sub ch.* 15.

Form of commission 2. The form of the commission shall be as follows: 'The State of Maryland, to A. B., C. D. and E. F. of —— county, gentlemen, greeting. Be it known, that reposing great trust and confidence in your judgment, integrity and love of justice, we hereby appoint you justices, and each of you a justice of the orphans court for —— county, to do equal right and justice, according to the law of this state, in every case in which you shall act under this commission, freely without sale, fully without denial, and speedily without delay; and you, or any two of you, are appointed and authorized to execute the powers of the said orphans court, honestly and faithfully, according to law, until you shall be duly discharged from your said office. Given under the seal of the state of Maryland, this —— day of ——. Witness —— ——, chancellor.'—*Id.*

Tenure in office.

3. Each of the persons named in such commission shall be entitled to hold and exercise his office until a new commission as aforesaid, in which his name shall not be included, shall be produced, and opened in court of which he is a justice.—*Id.*

4. Every such commission, if the persons therein named, or any of them, shall qualify under it, shall be recorded in the offices of the registers of wills, amongst the proceedings of the orphans courts whereof they are appointed justices.—*Id.*

6. Any person who shall qualify under such commission may also act under a commission as justice of the peace.—*Id.*

Oath of office.

7. But no person named in such commission to the orphans court shall be authorized to act as justice of the orphans court, until he shall have repeated and subscribed a declaration of his belief in the christian religion, and taken, repeated and subscribed, the oath of allegiance prescribed by the constitution, and the oath of a judge or justice prescribed by the act of February, seventeen hundred and seventy-seven, chapter five,* and the oath of fidelity to the United States, prescribed by act of congress; and any person named in such commission may administer the said oaths to, and take the declaration aforesaid of, any other named in the commission, but it shall not be necessary for any person named in such commission, who has acted as a justice under the next preceding commission, to qualify on opening the new commission.—*Id.*

Times of meeting.

8. The orphans court shall be held in each county on the second Tuesday in every month of February, April, June, August, October and December, and oftener if need be, according to its own adjournment; and any one of the justices of the said court, in the absence of the others, shall have power to hold the said court, at a stated time of adjournment, only for the purpose of adjourning; any two of them shall have full power to do any act which the said court is or shall be authorized by law to perform, and any two of them shall have power to hold the court, on any day not named in an adjournment, on the application of any person having pressing business in the said court, provided notice thereof be given to all, and in such case the register shall record that such notice hath been given.—*Id.*

Jurisdiction

12. The orphans court in each county shall keep a seal for the said court, and for the office of register of wills; and each orphans court that hath not already a seal, shall provide the same at the expense of the county, and the said seal shall be fixed to all certificates of the court, or of the register, and to every process and writ of every kind issued from the court. The orphans court shall have full power, authority and jurisdiction to examine, hear and decree upon, all accounts, claims and demands existing between wards and their guardians, and between legatees, or persons entitled to any distributable part of an intestate's estate, and executors and administrators, and may enforce obedience to, and execution of, their decrees, in the same ample manner as the court of chancery may; and the court may, upon the application of an infant, or any person in his behalf, suggesting improper conduct in any guardian whatever, either in

* See act of 1822, ch. 204.

relation to the care and management of the property or person of any infant, inquire into the same, and at their discretion remove such guardian and make choice of another, who shall give security, and conduct himself in the manner hereinbefore prescribed, and shall receive the property and custody of the said ward.—*Id.*

Mode of proceeding.

13. The orphans court shall, in all cases, have power to issue a summons for any person concerned in the affairs of a deceased person, or for any witness or other person whose appearance in the said court, for any purpose, shall be deemed necessary or proper, and the said summons shall be returnable, at the discretion of the court, or as hereinbefore directed; and if it be necessary or proper to enforce the appearance of the party, the court, on the return of 'summoned,' and failure to appear, may issue an attachment; and when the party shall appear, or be brought in thereon, may fine him or her, not exceeding thirty dollars; and if a witness before the court shall refuse to give evidence, the court may commit him or her to the custody of the sheriff of his or her county, or coroner, (if the case may require,) there to remain until he give evidence, or be discharged according to law; or the court may attach and sequester the party's estate, or a part thereof, as hereafter directed.—*Id.*

Duty of sheriff.

14. Every sheriff and coroner, (as the case may require,) shall serve any summons or process to him directed by the orphans court of his or any other county within the state, and shall make return thereof according to its tenor, and on failure, he shall be liable to be proceeded against by attachment and fine as aforesaid, or otherwise, as any other person may be proceeded against.—*Id.*

Attachment and sequestration.

15. In any case where two summonses shall be regularly returned *non est* by the sheriff, or other officer of the county where the party last resided, and it shall be necessary to proceed further to compel the party's attendance, the court may order and issue an attachment against his or her lands, tenements, goods and chattels, and on return of such attachment, to which a schedule of the property (if any) attached shall be annexed, the court, by order, or commission under seal, may authorize some person or persons to take into his care and custody the lands, tenements, goods and chattels, returned in the schedule, or any part thereof, and receive the profits thereof, to be accounted for, until the party shall appear and obey the order of the court, or until further order, and the sheriff, or other officer, shall deliver the property accordingly, or be liable to be proceeded against as aforesaid; *provided*, that the person or persons so authorized shall first give bond to the state, with such security, and in such penalty, as the court shall direct, to be recorded, sued, and to be on a footing with an administration bond, conditioned for rendering a true account of the said estate or property, and of the profits thereof, and to deliver the same according to the court's order, deducting such allowance for loss, and such commission, not exceeding five per cent. on the whole, as the court shall think proper to grant; and whenever the purpose for which the said property was sequestered shall have been answered, the court shall direct the said estate or property, and profits, (deducting as aforesaid,) to be restored to the party; and on the death of the party, the

court shall order the same to be delivered to his or her heirs, devisees, or legal representatives, as soon as the said purpose shall be answered, or immediately, on application, and satisfying the court of the party's right, in case the said purpose, after the death of the original party, cannot be answered.—*Id.*

Plenary proceeding.

16. Whenever either of the parties having a contest in the orphans court shall require, the said court may direct a plenary proceeding, by bill or petition, to which there shall be an answer, on oath, (or affirmation,) and if the party refuse to answer on oath, (or affirmation, as the case may require,) to any matter alleged in the bill or petition, and proper for the court to decide upon, the said party may be attached, fined and committed, or his property may be attached and sequestered, as aforesaid.—*Id.*

Issues.

17. And on such plenary proceeding, all the depositions shall be taken in writing, and recorded; and in case either party shall require, the court shall direct an issue or issues to be made up, and sent to any court of law which may be most convenient, under all circumstances, for trying the same; and the said issue or issues shall be tried in the said court of law as soon as may be, without any continuance longer than is necessary to procure the attendance of a witness or witnesses; and the power of the court of law, and proceedings thereto relative, shall be as hereinbefore directed respecting the trial of issues;* and the orphans court shall give judgment, or decree upon the bill and answer, or upon bill, answer, depositions, or finding of the jury; and in all cases of contest, the orphans court may award costs to the party in their opinion entitled thereto, and may compel payment, by attachment of the body, and fine, or attachment and sequestration, as aforesaid, of the property.—*Id.*

Appeal.

18. Any person who may conceive him or herself aggrieved by any judgment, decree, decision or order, of the orphans court, shall have the liberty of appealing to the court of chancery, or to the general court of the Shore whereon such orphans court is held; if the judgment, decree, decision or order, shall have been given or made on a summary proceeding, and on the testimony of witnesses, the party shall not be allowed to appeal, unless he or she shall immediately notify his intention, and request that the testimony may be reduced to writing, and in such case the depositions shall be, at the cost of the party in the first instance, reduced to writing; and a transcript of the whole proceedings relating immediately to the matter, shall be made out by the register of wills, and certified by him under seal, and transmitted to the said appellate court by the party within thirty days from the date of the decision or order, the said party shall otherwise lose the privilege of appeal; and, if the decision of the orphans court be in a summary way, and on papers filed in the court, no party shall be entitled to appeal, unless he or she enter the appeal within three days, and transmit a certified copy of the proceedings as aforesaid, within thirty days aforesaid; but in case there shall have been plenary proceedings as aforesaid, either party may prosecute the appeal, by entering the same as aforesaid, and by transmitting a certified copy as aforesaid within

* See post.—sub ch. 8, sec. 20.

sixty days from the date of the decree, judgment, decision or order, provided that this article shall not affect the case of appeal by this act before specially provided for; and in the said appellate court the appeal, so carried up, shall stand for hearing and decision at the term next succeeding the transmission of the proceedings, and the said court shall, at the said term, or as soon as conveniently may be, either affirm the decree, judgment, decision or order, of the court below, or direct in what manner it shall be changed or amended, and the decision of such appellate court shall be final and conclusive; and when the decision of such appellate court shall be certified, under the seal by the register or clerk of such court, and transmitted to the orphans court, the said orphans court shall proceed according to the tenor or directions thereof.—*Id.*

The appeal provided for in this section is modified by the following act of 1818, ch. 204.

An Act for the better regulations of Appeals from the several Orphans Courts in this state.

1. *Be it enacted by the General Assembly of Maryland*, That in all decrees, orders, decisions and judgments, hereafter to be made by any orphans court of this state, the party or parties who shall deem him, her or themselves aggrieved by such decree, order, decision, or judgment, may appeal to the court of appeals of this state, provided such appeal be made within thirty days after such decree, order, decision, or judgment.

In all decrees, &c. hereafter made in orphans court, party aggrieved may appeal.

2. *And be it enacted*, That if upon an appeal being entered, the parties shall mutually agree and enter their assent in writing, to be filed by the register of the orphans court, that the appeal shall be made to the county court, the orphans court shall direct a transcript of the proceedings to be transmitted by the register to the county court, whose decision shall be final.

If parties agree that appeal be made to the county court transcript of proceedings to be transmitted.

3. *And be it enacted*, That in all cases of plenary proceedings or caveat filed in any of the orphans courts of this state, where any motion or application to the court shall be made in writing, it shall be the duty of the court to reduce to writing, and sign the order or decree that may be made by them on such motion or application, and the said motion or application to the court, and the order or decree thereon, shall be filed as a part of the proceedings, and in case of appeal from the final decree of the orphans court, be transmitted to the appellate court with the other proceedings, and subject to the judgment and revision of such appellate court.

In case of plenary proceedings &c. where motion shall be made in writing, to be filed as parts of proceedings &c.

4. *And be it enacted*, That so much of an act of assembly, passed at November session, seventeen hundred and ninety-eight,* and also so much of an act passed at November session, eighteen hundred and two,* as relate to appeals from the orphans court to the general court, court of chancery, and county court, be and the same are hereby repealed.

Parts of acts repealed.

*Ch. 101.

In the case of Sewel *vs.* Sewel, on appeal from the orphans court of Calvert county, the appeal was dismissed because it was not prosecuted within thirty days. 1 *Gill & John.* 9.

Appeals not to be staid.

19. An appeal from the orphans court shall not stay any proceedings therein which may with propriety be carried on before the appeal is decided, provided the said orphans court can provide for conforming to the decision of the court above, whether the said decision may eventually be for or against the appellant. 1798, *ch.* 101, *sub ch.* 15.

Restriction of jurisdiction.

20. The said orphans court shall not, under pretext of incidental power, or constructive authority, exercise any jurisdiction whatever not expressly given by this act, or some other law; but every judgment, decree, decision or order, of the said court, may be enforced by attachment and sequestration as aforesaid; and if the said judgment, decree, decision or order, be for paying money, the property sequestrated may, at the discretion of the court, be applied to the purpose for which such judgment, decree, decision or order, was given.—*Id.*

Acts repealed.

IV. *And be it enacted*, That the act of assembly for instituting orphans courts, (1777, chap. 8,) and every supplement or act in addition thereto, or so much thereof as is repugnant to the provisions of this act, shall be and are hereby repealed from the time when the operation of this act is to commence.—1798, *ch.* 101.

The act of February session of 1777, chap. 8, authorizing the orphans court to summons a jury of twelve freeholders to their assistance, on an issue of '*devisavit vel non*,' is repealed by this act. *Barrol & Carroll vs. Reading.* 5 *Har. & John.* 175.

Either party concerned in the question whether a will shall be admitted to probate has a right at any stage of the proceedings in the orphans court, prior to a final decision, to have a plenary proceeding, and an issue sent to a court of law for trial.—*Id.*

If the orphans court refuse such a proceeding, it is a proper subject for an appeal.—*Id.*

In *Scott vs. Burch*, 6 *Har. & John.* 79, the court say 'By the 20th section of sub chapter 15, 1798, chap. 101, it is declared that the orphans court shall not, under pretext of incidental or constructive power, exercise any power whatever not expressly given by that act or some other law, and to avoid the necessity of recurring to incidental or implied authority the power of the orphans court, both in relation to the subject matter of its jurisdiction and the forms of its proceeding, are declared with the most formal and precise minuteness.'

The orphans court derive these powers mostly from statutory provisions, and are tribunals confessedly limited in their jurisdiction, unable to exercise any authority whatever not expressly given by law. *Brodess vs. Thompson.* 2 *Har & Gill*, 120.

The orphans court of one county have no authority to grant letters of administration on the estate of a person who resided and died in another county. *Raborg vs. Hammond.* 2 *Har. & Gill*, 42.

The orphans court are expressly enjoined by the 3d section of sub chapter 5, to inquire into, and adjudicate on, the time and place of the death of the deceased intestate; that duty, however, is presumed to have been rightfully discharged, when the question of administration incidentally occurs in another court; therefore in a suit instituted by the administrator, it is not competent for a court of law to go into the inquiry whether administration has been rightfully granted or not. If letters of administration have been improvidently issued, or obtained by fraud, they may be revoked upon application to the orphans court, the power of revocation under such circumstances being necessarily an inherent power, under the power delegated to them of granting administration.—*Ib.*

Letters of administration, clothed with all legal solemnities, cannot be nullified in a court of law on the ground of informality or irregularity in granting them, so long as they remain unrevoked by the court that granted them. *Fishwick vs. Sewell.* 4 *Har. & John.* 394.

The appointment of a person as guardian by only two judges of the orphans court, which guardian was one of the judges, cannot be questioned on an action on his bond. *State vs. Fridge*, 3 *Gill & John.* 104.

The orphans court of the county, where letters of administration are granted, have the power in all cases to appoint a guardian to the infant children of the intestate—such an appointment cannot in any manner be affected by the fact, that a guardian for such children had been appointed by the tribunals of another state. *Graft vs. Vickey*, 4 *Gill & John.* 332.

Accounts settled by an executor, or administrator, or guardian, in the orphans court are not conclusive, but are prima facie evidence, to shew the situation of the personal estate of the deceased in all controversies between the executor or administrator, and the representatives of the deceased, guardian and ward; and in actions by creditors against the heirs or devisees of the deceased, for a sale of real estate by a decree of a court of chancery. *Gist vs. Cockey & Fendall*, 7 *Har. & John.* 135. *Spedden vs. State*, 3 *Har. & John.* 268. *State use of Sappington vs. Massey, id.* 276. *Selby vs. Gunby, id.* 277. *Haslet, adm. de bo. non, vs. Glenn*, 7 *Har. & John.* 17. *Owens vs. Collingson*, 3 *Gill & John.* 25. *Scott vs. Dorsey*, 1 *Har. & John.* 232. *McPherson vs. Israel*, 5 *Gill & John.* 63. There is an exception, however, to this power of revision and control by the courts of chancery and of common law, over the settlements made by the orphans court in the case of graduating the commission to be allowed executors and administrators for the settlement of the estates entrusted to their care, which *cannot* be the subject of review in another and superior court. *Gwynn vs. Dorsey*, 4 *Gill & John.* 460.

If the allowance claimed and made by the court was in its nature improper to be charged by an executor, the auditor ought not to credit the executor therewith. The auditor should not require evidence to establish the charges allowed by the orphans court, provided the said articles were of a nature proper to be allowed. *Per Chancellor Hanson, in Scott vs. Dorsey*, 1 *Har. & John.* 232.

The proceedings of the orphans court as to the settlement and distribution of an intestate's estate, by the administrator, are competent and sufficient evidence against an administrator. *Scott vs. Burch*, 6 *Har. & John.* 79.

The orphans court have a limited discretion with regard to the amount of the administrator's commission, and no good reason can be assigned why they should not have the like discretion as to the *time* and *manner* of making the allowance—of course, they would make the commission allowed correspond with the duties performed, and in passing every account would look to the advance made in the administration of the assets, in bestowing on him the reward for his services. *Gwynn vs. Dorsey*, 4 *Har & Gill*, 460.

Where there has been a full administration, the court cannot descend below five per cent. commission to the administrator on the whole property, but where the duty of administering the whole property has been only in part performed, to make a just and suitable remuneration for what has been done, they may give, if the circumstances require, one per cent and even less, if necessary. Whatever is allowed, must nevertheless be a per centage on the whole assets, as this is the only standard known to the law, whereby to ascertain the commission. The inventory of the deceased's estate, and in an enlarged construction of this, all the assets accounted for by the administrator is the true standard by which the court is to graduate the commission. *McPherson vs. Israel*, 5 *Gill & John.* 64.

The orphans court has no jurisdiction to decree the goods of the intestate to be delivered over, in any event, or upon any terms by the surety to the administrator qua such. *Scott vs. Burch*, 6 *Har. & John.* 67.

2. *And be it enacted*, That if any security of a guardian, appointed by virtue of the act to which this is a supplement, shall conceive him or herself in danger of suffering from the suretyship, he may apply to the orphans court by which such guardian was appointed, and the said court may call on such guardian to give counter-security, and if the said guardian shall

In certain cases guardian may be called on to give counter security, &c.

not, within a fixed reasonable time, give such counter-security, the said court may revoke the appointment of such guardian, and appoint a new guardian; and in case the guardian whose appointment is revoked as aforesaid, shall refuse or neglect, in a reasonable time after demand, to deliver over to such new guardian the property of the ward, the said court may compel the same by attachment, and may direct the bond of such displaced guardian to be put in suit.—1807, *ch.* 136.

Court may call on executor or administrator to give new security, &c.

3. *And be it enacted*, That it shall and may be lawful for the several orphans courts in this state to call upon any executor or administrator, to whom letters testamentary or of administration have been by them respectively granted, to give new security, to be approved of by such court, and if such executor or administrator shall refuse or neglect to give such new security within a fixed reasonable time, the said court may revoke such letters testamentary or of administration, and appoint a new administrator or administrators; and in case such executor or administrator shall refuse or neglect, in a reasonable time after demand, to deliver over to such new administrator or administrators, the property of the deceased remaining in his hands unadministered, the said court may compel the same by attachment, and may direct the administration bond of such executor or administrator to be put in suit.—*Id.*

Court authorized to appoint guardians to infants who may acquire property by gift or purchase, &c.

4. *And be it enacted*, That the said several orphans courts be and they are hereby authorized and empowered to appoint a guardian or guardians to an infant, who may acquire real or personal property by gift or by purchase, in the same manner, with the same powers, and upon the same terms and conditions, that they may appoint a guardian or guardians to an infant acquiring such property by descent, devise, or in right of distribution.—*Id.*

Powers vested in orphans court.

Be it enacted by the General Assembly of Maryland, That the orphans courts of the several counties of this state, are hereby authorized and empowered, in all cases where letters testamentary or of administration have been or hereafter may be revoked, and new letters granted, by any of the said courts, to enforce by attachment, sequestration of property and imprisonment, the delivery or payment over of all unadministered assets by the person whose letters as aforesaid have been or may be revoked, to the person to whom such new letters have been or may be granted.—1817, *ch.* 178.

Proceeds of lands sold to be vested in public stocks.

5. *And be it enacted*, That the proceeds of the sales made by and in virtue of this law, shall be paid over by the trustee or trustees to the guardian or guardians of such infant or infants, to be by such guardian or guardians vested in such public stock, or other permanent funds, as will at least net six *per centum per annum* at the time of the purchase, and as the orphans court of the said county, by whom such guardian or guardians shall have been appointed, shall direct.—1816, *ch.* 154.*

Surplus to be invested.

6. *And be it enacted*, That the surplus interest after what may be necessary for the maintenance and education of the said infant

* This law authorizes the lands of minors to be sold by the order of the county courts or by the chancellor.

or infants respectively, as it accrues, shall be vested by such guardian or guardians, in such stock as aforesaid, and as the orphans court shall and may direct as aforesaid.—*Id.*

7. *And be it enacted*, That all moneys vested by and in virtue of this law, shall be vested in the name of such infant or infants, and shall be transferable only by virtue of an order of the orphans court aforesaid, and all transfers without such order are hereby declared void to all intents and purposes.—*Id.*

To be vested in name of infants.

1. *Be it enacted by the General Assembly of Maryland*, That every natural guardian, or guardians appointed by last will and testament, of the estate or property of minors, shall give bond, with securities to be approved by the orphans court; shall settle the accounts of their guardianship, and shall be under the like rules and regulations as are prescribed by the original act to which this is a supplement with respect to other guardians. 1816, *ch.* 203.

Natural guardians to give bond, &c.

2. *And be it enacted*, That the orphans court shall have authority to empower any guardian to sell any leasehold estate belonging to his ward, if the court shall think such sale advantageous to such minor, and shall order the proceeds of such sale, or any surplus money belonging to said minor or orphan, to be invested in bank stock, or any other good security, which investment shall be made in the name of the minor or orphan, and that no sale, transfer or disposal of the stock, of such minor or orphan, shall be made without the concurrence of the orphans court.—*Id.*

Orphans courts to empower them to sell leasehold estates, and vest the proceeds.

3. *And be it enacted*, That in case of the death of an executor or administrator before an account of his administration shall have been settled with the orphans court, it shall be the duty of the executor or administrator of the one so dying, to render such account, shewing thereby the amount of assets received, and the payments made by the deceased executor or administrator, and the account so rendered shall be examined by the court, and if found to be correct, shall be admitted to record in the same manner that other administration accounts are examined and recorded—*Id.*

Proceedings in case of death of executor or administrator before settlement of administration.

4. *And be it enacted*, That whenever any joint administrator or executor shall apprehend they are likely to suffer by the negligence or misconduct in the administration, improper use or application of the assets of the estate, by any executor or administrator, they shall make complaint thereof to the orphans court, and if the same shall be adjudged well-founded, the court shall have authority, in their discretion, to revoke the powers and authority of the executor or administrator so complained of, and to enforce by attachment and commitment if necessary, the surrender and delivery to the remaining executors or administrators of the assets of the estate, and of all books, accounts, papers and evidences of debt, of the estate, that may be in the possession or control of the person so dismissed from the administration, and the remaining executors or administrators shall have remedy, by an action on the case, for the recovery of any loss or damage they may be subject to, or suffer by the executor or administrator whose powers shall have been revoked as aforesaid.—*Id.*

When a joint administrator apprehends misconduct on part of any administrator, he may complain to court, &c.

Person interested in estate of security, &c. to have right to call for counter security.

Sec. 3. *And be it enacted*, That any person interested in the estate of any security of an executor or administrator, shall have the same right and privilege to call upon such executor or administrator, for counter security, in the same manner as a security to an executor or administrator now can, and the same proceedings shall be thereon had as if the application had been made by a security to an executor or administrator, according to the provisions of the original act to which this is a further additional supplement.—1818, *ch.* 217.

Orphans courts to appoint trustees.

Sec. 1. *Be it enacted by the General Assembly of Maryland*, That in all cases where special acts of the assembly have been passed, authorizing any orphans court in this state to appoint a trustee to sell and dispose of real estate, the property of minors, and the trustee appointed hath died or removed without completing and fully executing his trust, the orphans court of the proper county shall be, and is hereby authorized and empowered to appoint another trustee to carry into effect the provisions of the particular act.—1821, *ch.* 156.

Course of proceeding

2. *And be it enacted*, That the course of proceedings shall be regulated in each case in which proceedings may be had under this act, according to the provisions of the particular act under which a trustee has been appointed, and who has died or removed without fully executing and completing his trust.—*Id.*

Preamble.

Whereas, great frauds have been practised by the employment of agents in the administration of the estates of deceased persons, who are not compelled by law to make any return of their proceedings to the several orphans courts in this state, and cannot be examined by said courts, on oath, as to their proceedings, when employed by executors and administrators in the administration of the estates of deceased persons, therefore,

Agents may be examined on oath

Sec. 1. *Be it enacted by the General Assembly of Maryland*, That from and after the passage of this act, the orphans court of this state, be and they are hereby authorized and empowered wherever they are satisfied that an agent has been employed in the administration of the estate of a deceased person by an executor or administrator or executrix or administratrix, to examine such agent on oath of all proceedings which may have taken place relative to the administration of the estate of any deceased person in which such agent may have been employed, in like manner, as they are now authorized by the act to which this is a supplement to examine executors or administrators. 1823, *ch.* 131.

Securities of administrators demanding counter security--proceedings directed.

Sec. 1. *Be it enacted by the General Assembly of Maryland*, That if any security of an executor or administrator, or any person interested in the estate of any security of an executor or administrator, shall conceive him or herself, in danger of suffering from the suretyship, he or she (as the case may be) may apply to the orphans court which granted the administration, and the said court may call upon the party to give counter security, to be approved by the said court, and if the party so called on, shall not within a reasonable time to be fixed by the said court, give such counter security, the said court may revoke the letters testamentary or of administration granted to such executor

or administrator, and appoint a new administrator or administrators; and in case the executor or administrator whose letters are revoked as aforesaid, shall not within a reasonable time, to be fixed by said court, deliver over to such new administrator or administrators, all the property of the deceased remaining in his hands unadministered, and also, all the books, bonds, notes, and evidence of debt, which belong to, or are due to the deceased, in his possession, and also pay over to such new administrator or administrators, all the money due by him as executor or administrator of the deceased; the said court may compel the delivery and payment over as aforesaid, by attachment and sequestration of property, and may also direct the administration bond of such executor or administrator, whose letters are revoked as aforesaid, to be put in suit.—1829, *ch.* 216.

Proceedings directed in cases therein mentioned.

SEC. 2. *And be it enacted*, That in case of the death of any executrix, administratrix, or female guardian, before a final account of her administration or guardianship shall have been settled with the orphans court, and who shall have a husband living at the time of her decease, it shall be the duty of such husband to render an account, shewing thereby the amount of money and property received, and the payments and disbursements made by such executrix, administratrix, or female guardian, or that may have been received and paid by the husband of such executrix, administratrix or guardian, and not before accounted for, with the court, and the account so rendered shall be examined by the orphans court, and if found to be correct, shall be admitted to record in the same manner, and shall be subject to the same rules and regulations, as other administrators or guardian accounts are in cases where the executrix, administratrix or guardian, renders them in person; and in case the husband shall neglect, or refuse to render such account, the orphans court of the county in which administration is granted, or where the guardian was appointed, (or if it be the case of a testamentary guardian, where he or she is obliged to render an account,) shall proceed against him by attachment, and may commit such husband, until he shall render an account as aforesaid.—*Id.*

Copy of bond of indemnity legalized.

SEC. 3. *And be it enacted*, That in all cases where any bond shall have been, or may hereafter be executed, and made payable to the state of Maryland, by an executor or executrix, administrator or administratrix, or guardian, for the purpose of indemnifying and saving harmless, any security, or person interested in the estate of any security, on his or her testamentary administration or guardian's bond, any such security or person interested in the estate of such security, shall be entitled to, and have on demand, a copy of such bond certified by the register of wills, under his hand and the seal of his office; upon which copy, an action may be maintained in the name of the state, for the use of the party or parties interested, and judgment may be recovered upon such action, for the damage or loss actually sustained.—*Id.*

Counter security may be demanded of guardians, &c.

SEC. 4 *And be it enacted*, That any person who may be interested in the estate of any security of a guardian or guardians, shall have the same right and privileges, to call upon such guardian or guardians, to give counter security, in the same manner

as a security to a guardian may now call for counter security, and the same proceedings shall be had thereupon by the orphans court of the county, in which the guardian or guardians may have been appointed, (or given bond in case it be a natural or testamentary guardian) as if the application or call had been made by a security to a guardian, according to the provisions of the act of eighteen hundred and seven, chapter one hundred and thirty-six, section two.—*Id.*

AN ACT to authorize the orphans courts of this state to apportion the expenses incurred in improving real estates in cases of dower in said estates.—1830, *ch.* 99.

To apportion expenses.

SEC. 1. *Be it enacted by the General Assembly of Maryland*, That from and after the passage of this act, it shall and may be lawful for the judges of the orphans courts of this state, in their respective counties, to adjudge, determine and apportion, in their discretion, what part of the expenses shall be borne or paid by the widow, which may or shall accrue in making the necessary repairs or improvements on the real estates in which a widow or widows shall, or may at the time such repairs are so made and done, be entitled to a right of dower.

Expenses incurred in repairs, &c.

SEC. 2. *And be it enacted*, That wherever expenses are, or shall be incurred in effecting repairs or improvements on any real estate, in which a widow or widows shall hold a right of dower, an account shall be rendered to the orphans court of the county by the party having said repairs so done, setting forth in what way or manner such expenses have accrued, shewing the amount of expenditures in repairs as aforesaid, and on such account being rendered to the orphans court aforesaid, it shall be their duty to order such portion of said expenses to be paid by the widow or widows, person or persons, having control over said right of dower, to the person or persons claiming, and in all cases shall the right of dower be answerable for the payment of such apportionment of expenses; *provided*, that nothing contained in this act shall be so construed as to authorize the said orphans courts to apportion the expense of repairs in any case whatever, except where minors are concerned.

Proviso.

May reject or allow claims, &c.

SEC. 3. *And be it enacted*, That in all cases provided for by this act, the orphans courts of this state, in their respective counties shall have full power to allow or reject all claims for apportionment of expense in making repairs or improvements, as they may deem proper, having at all times a due regard to all the circumstances of the cases before them, and provided that no allowance or apportionment of any such expenses under this act, shall be made, unless the said repairs or improvement shall have been first authorized and directed by the orphans court of the county where the case may arise or accrue.

Right of appeal.

SEC. 4. *And be it enacted*, That if any person or the guardian of any person, may conceive him or herself aggrieved by the decision of any orphans court under the provisions of this act, he or she may appeal to the county court, and a transcript of the proceedings shall be sent to the said county court, who shall hear and examine the same, and give such judgment in the matter, as may be according to right and equity.

Orphans court or register in recess authorized to take probate of any will, having relation to real as well as personal estate. Which as to real estate shall be but prima facie.

SEC. 1. *Be it enacted by the General Assembly of Maryland*, That the orphans courts, and in their recess, the registers of wills of the several counties in this state, be, and they are hereby authorized and empowered to take the probate of any will, testament or codicil, whether the same has relation to real or personal estate, or to both real and personal estate, in the same manner, that the original act to which this is a further supplement, authorizes the said courts or registers, to take the probate of wills, testaments and codicils, containing any disposition relative to goods, chattels or personal estate, which said probate as concerns real estate, shall be deemed and taken only as prima facie evidence of such will, testament or codicil.—1831, *ch.* 315.

Court may order executor or administrator to bring into court or to deposite funds, &c. Invest. Cases of neglect. Letters revoked.

SEC. 4. *And be it enacted*, That the orphans courts of the several counties in this state, be, and they are hereby authorized and empowered in their discretion, and whenever to them it shall seem proper, either ex-officio, or upon application, to order any executor or administrator, to whom they may have granted letters testamentary, or of administration, to bring into court or place in bank, or invest in bank stock, or in any other good security, any money or funds received by such executor or administrator, and the court shall direct the manner and form in which such money or funds shall be placed in bank or invested as aforesaid, and if such executor or administrator, shall not within a reasonable time to be fixed by the court, comply with the order of the court, the letters testamentary or of administration, granted to such executor or administrator may be revoked.—*Id.*

Court may order executor, administrator, or guardian to bring into court or deposite or invest funds subject to order of court. Case of neglect. Letters revoked.

SEC. 5. *And be it enacted*, That the orphans courts of the several counties in this state, be, and they are hereby authorized and empowered in their discretion, and whenever to them it shall seem proper to order any executor or administrator, to whom they may have granted letters testamentary or of administration, or any guardian whom they may have appointed, or whose bond they may have approved of, if it be a natural or testamentary guardian, to bring into court, or place in bank, or invest in bank or other incorporated stock, or in any other good security, any money or funds received by such executor, administrator or guardian, and the court shall direct the manner and form in which such money or funds shall be placed in bank or invested as aforesaid, and the same shall at all times be subject to the order and control of such court, and if such executor, administrator or guardian, shall not within a reasonable time to be fixed by the court, comply with the order of the court, the letters testamentary or of administration, granted to such executor or administrator, or the guardianship as the case may be, may be revoked by the court.—*Id.*

Case of revoking letters. Account to be rendered. On failure.

SEC. 6. *And be it enacted*, That in all cases hereafter, whenever any orphans court in this state, shall revoke letters testamentary or of administration, or of guardianship, it shall be the duty of the party, whose letters or guardianship may be revoked, forthwith, to render to such court an account of his administration or guardianship as the case may be, up to the period of the rendition of such account, and in case he shall fail so to do within the time fixed by such court, the court may compel the

Sequestration or imprisonment.

rendition of such account by attachment, sequestration of property, and the imprisonment of the party so failing, until such account shall be rendered as aforesaid.—*Id.*

Court shall appoint new administrator.

Former administration to deliver over.

On failure.

Sequestration and suit.

SEC. 7. *And be it enacted*, That when any orphans court in this state, shall revoke letters, testamentary or of administration, and there be no remaining executor or administrator, it shall be the duty of such court to appoint a new administrator, and in all cases hereafter if the party whose letters testamentary, or of administration may be revoked, shall not within a reasonable time to be fixed by such court, deliver over to such new administrator, or to the remaining executor or administrator as the case may be, all the property of the deceased remaining in his hands unadministered, and also all the books, bonds, notes and evidences of debt or funds, and all titles to property or stocks which belong to, or are due, or which may become due to the deceased in his possession; and also pay over to such new administrator, or remaining executor or administrator, as the case may be, all the money due to him as executor or administrator of the deceased, the court may compel the delivery and payment over as aforesaid, by attachment and sequestration of the property of the party, whose letters may be revoked, and may also direct to be put in suit the administration or testamentary bond of such executor or administrator whose letters have been revoked.—*Id.*

Case of revoking guardianship.

Former guardian to deliver over

On failure.

Sequestration and suit.

SEC. 8. *And be it enacted*, That when any orphans court in this state shall revoke the guardianship of any guardian, and there be no remaining guardian, it shall be the duty of such court to appoint a new guardian, and in all cases hereafter if the party whose guardianship is revoked shall not within a reasonable time to be fixed by said court, deliver over to the remaining guardian, if there be one, if not, then to the new guardian, all the property of the ward remaining in the hands of the party whose guardianship is revoked as aforesaid, and also all the books, bonds, notes and evidences of debt or funds, and also all title to property or stock which belong to, or are due, or which become due to the ward in the possession of the guardian, whose guardianship may have been revoked as aforesaid, and also pay over to the remaining guardian, if there be one, if not, then to the new guardian, all the money due to him as guardian of the ward, the said court may compel the delivery and payment over as aforesaid by attachment and sequestration, of the property of the party whose guardianship may be revoked, and may direct to be put in suit the bond of the guardian, whose guardianship shall have been revoked as aforesaid.—*Id.*

Executor empowered when directed to sell real estate.

Account therefor.

Commission.

SEC. 10. *And be it enacted*, That in all cases where an executor may be authorized and directed to sell the real estate of a testator or testatrix, such executor may sell and convey the same, and shall account therefor to the orphans court of the county, where he or she obtained letters in the same manner, that an executor is now bound to account for the sales of personal estate, ordered by the orphans court, and the said court may allow such executor a commission on the proceeds or sales of such real estate, not exceeding five per cent. where the amount of sales of real estate exceed three thousand dollars in the same manner as if

it were personal estate, but such sales shall not be valid or effectual, unless ratified and confirmed by the said orphans court, after notice by publication given in manner as is practised in cases of sales of lands under decrees in chancery.—*Id.*

Subject to ratification and confirmation. Notice required.

SEC. 12. *And be it enacted*, That if any executor or administrator shall believe that any person hath concealed any part of the personal property of a deceased person, upon whose estate such executor or administrator may have obtained letters testamentary, or of administration, and shall file a petition or bill of complaint in the orphans court of the county, in which he may have received letters, alleging such concealment, it shall be the duty of such court to compel the person against whom such allegation shall be made, to answer such petition or bill of complaint, in writing, under oath, and may attach and commit the party, in case he or she shall refuse so to answer, and in case the said court shall believe, upon an examination of the whole case, that the party against whom such allegation shall be made, hath concealed any part of the personal estate of the deceased, the said court may order the delivery over of the same to such executor or administrator, and may compel such delivery over by attachment, sequestration of property, and the imprisonment of the party, if the said court shall think proper: *Provided*, that in case either party, after a perfect answer put in, shall require it, the court shall direct an issue or issues to be made up, and sent to any court of law which may be most convenient under all circumstances for trying the same, and the said issue or issues shall be tried in the said court of law in the same manner, and there shall be the same proceedings had thereupon as is prescribed by the act of seventeen hundred and ninety-eight, chapter one hundred and one, in relation to other issue or issues sent from the orphans court.—*Id.*

Case of apprehended concealment of property. Executor or administrator may file petition. Orphans court authorized to compel answer. Commit for refusal. Compel delivery over. Appeal provided.

SEC. 13. *And be it enacted*, That the provisions of the aforegoing twelfth section of this act, be and they are hereby extended to all cases where any creditor, or the widow, or any next of kin, legatee or devisee of the testator or intestate, or where any other person interested in the estate of the testator or intestate, shall by petition or bill of complaint as aforesaid, allege that the executor or executors, or any of them, or administrator or administrators, or any of them, has concealed, or has in his or their hands, and has omitted to return in and as part of the inventory of the estate of the testator or intestate, or in and as part of the list of debts belonging to such estate, any property, stocks, claims, or evidence of claims; and if said courts shall finally adjudge and decree in favour of the allegations of said petition or bill of complaint, in whole, or in part, the said court shall order an additional inventory or list of debts, as the case may be, to be returned by the executor or executors, administrator or administrators aforesaid; and an appraisement to be made accordingly, to comprehend the property, stocks, and claims, in respect of which the court shall so adjudge and decree, in manner as is prescribed in reference to inventories and lists of debts of the estates of deceased persons, and such additional inventory or lists of debts, shall have the same effect to all intents

Case of alleged concealment by the executor or administrator. Proceedings directed.

and purposes, as any inventory or inventories, or list or lists of debts, of said estate theretofore returned, and the said court may enforce such order in reference to the said additional inventory and lists of debts, by attachment and imprisonment, and sequestration of property of the executor or executors, or administrator or administrators, complained against by said petition, and decreed to be in default or liable, and if such executor or executors, administrator or administrators, shall, either before or after such process of attachment, imprisonment, and sequestration, fail to comply with such order, his or their letters testamentary, or of administration, may be revoked, and the court may direct to be put in suit the administration or testamentary bond of such executor or executors, administrator or administrators; and the said property, stocks and claims, and all liability of such executor or executors, administrator or administrators, therefor ordered to be comprised in such additional inventory or list of debts, shall be decreed and taken to be within the condition of such bond; *Provided, however*, that in the cases provided for in this and the preceding section, any party may appeal from the decree of the orphans court to the county court of the county in which the orphans court shall sit.—*Id.*

Authority to enforce.

Revoke letters.

Suit, &c.

Appeal provided.

Sec. 14. *And be it enacted*, That a recess of any orphans court in this state, shall be deemed and taken to be not only such days as they may not hold a court, but also such parts or portions of a day, as they may not be in actual session; *And be it further enacted*, That all the acts heretofore done and performed by any of the registers of wills of the several counties of this state, during the periods in which such courts were not actually in session, shall be as valid and effectual, to all intents and purposes, as if such acts had been done and performed during the recess of such courts, any thing in any former laws contained to the contrary notwithstanding.—*Id.*

Recess of court construed.

Sec. 16. *And be it enacted*, That every will of which probat shall have been taken by any orphans court, shall be retained and preserved in the office of the register of wills of the county, and shall not be delivered out of such office to any person or persons whomsoever; and every issue of *devisavit vel non*, sent from the court of chancery, or any county court, sitting as a court of equity, shall be tried in the county of the office aforesaid, at which trial said will, may be adduced in evidence under care of said register, or of any person in that behalf by him deputed, under a *subpœna duces tecum*, issued on special order of the court holding such trial; and in like manner, such will may be produced in evidence on the trial in any court of this state, of any issue involving the said will, and requiring its production in the opinion of said court; but nothing herein contained shall authorize the taking or keeping said will at any time out of the care and custody of the said register, or of the person deputed as aforesaid.—*Id.*

All wills to be retained in register's office.

Produced on trials of suits, &c.

Sec. 2. *And be it enacted*, That where any award, made under order of any orphans court, shall be returned to said court, the same shall not be confirmed until after notice of the award, shall have been given to the parties to the reference, or their

Case of award.

Notice before confirmation.

representatives; and any parties may file exceptions or shew cause against the award upon any ground on the face of the award or extrinsic thereto; and the court may accordingly confirm or reject the award, and recommend the case to the referee or referees, for a new award, or appoint another referee or referees for the arbitration; and the orphans courts are hereby authorized to pass all such rules respecting notice aforesaid, in cases of awards and exceptions, and showing cause aforesaid and a hearing the premises, as they may deem reasonable.—1834, *ch.* 228.

Exception.

Revise proceedings.

Authority to adopt rules, &c.

AN ACT for the establishment of the Orphans Court of Carroll county. 1836, *ch.* 99.

SEC. 1. *Be it enacted by the General Assembly of Maryland*, That the governor, by and with the advice and consent of the council, shall appoint and commission three men of integrity and judgment, residents of Carroll county, to be the justices of the orphans court of said county, to be clothed with the same powers, authority and jurisdiction, and in all things governed by the laws which appertain generally to the orphans courts of the other counties in the state.

Appoint three justices.

SEC. 2. *And be it enacted*, That the regular terms of the orphans court of Carroll county shall be held on the second Monday in every month of February, April, June, August, October and December; and the said court, if necessary for the despatch of business, shall by its adjournments be held on the Monday of every week in the year, other than the weeks of the regular terms, and they are further hereby authorized to adjourn their court from Monday in each week in the year, if necessary for the despatch of business, to Tuesday in said week, the three justices of the orphans court concurring in such further adjournment, but in no case and under no circumstances whatever are they authorized or permitted hereby to sit oftener than two days in any one week, except during the session of the county court, when if necessary they may sit during the whole term, and the said orphans court shall sit from nine o'clock, A. M. until three o'clock, P. M.

Terms prescribed.

Meeting described.

SEC. 3. *And be it enacted*, That until the erection of a court house in said county, the said justices of the orphans court may in their discretion hold their court in any house in the town of Westminster, which they may select and be able to procure for that purpose, and they are hereby authorized to contract and agree at the county charge, for a convenient place in the said town, to hold their courts, and for a convenient place in the said town for the keeping of their books, papers and records.

Place of meeting.

SEC. 4. *And be it enacted*, That each of the justices aforesaid, shall receive an allowance of two dollars per diem for each and every day he shall be present during the session of said court, and in addition thereto shall be entitled to receive at the rate of twelve and a half cents per mile, as often as each of them shall attend the court, as itinerant compensation, for every mile each of them may travel, coming from his place of residence in the county to the town of Westminster, to attend the business of said court.

Compensation.

Ascertaining and paying.

SEC. 5. *And be it enacted*, That the register of wills of Carroll county, at each meeting of the orphans court, shall make a memorandum in the minutes of said court of the number of miles travelled by any justice of the orphans court as aforesaid, at every court each of them shall attend from the country, and the commissioners of tax for Carroll county shall at their annual levy of the county charges of Carroll county, levy said itinerant compensation for the use of any justice as aforesaid at the time of levying his per diem allowance, which shall be collected and paid to said justices in the same manner and at the same time that his per diem allowance shall be collected and paid.

AN ACT relating to changing the venue for the trial of issues of fact framed in the court of chancery, or any county court as a court of equity, or orphans court of this state, and sent to a county court for trial.—1836, *ch.* 269.

Preamble.

Whereas, the right of changing the venue as provided for by law, is confined to any suit or action commenced or instituted in any county court of this state, and the same right should for like reasons be extended to all issues of fact, wherever framed or originated for trial in any county court of this state—therefore,

Venue may be changed on issues of fact.

Be it enacted by the General Assembly of Maryland, That from and after the passage of this act, in all issues of fact, framed in the court of chancery, or any county court as a court of equity, or any orphans court of this state, and sent to any county court thereof for trial, the judges of the said county court upon suggestion, in writing, by either of the parties thereto, supported by affidavit, or other proper evidence, that a fair and impartial trial cannot be had in the county court of the county where such issue or issues are depending, shall and may order

Proceedings directed.

and direct the said issue or issues, with the proceedings accompanying the same, to be transmitted to the judges of any county court most convenient for trying the same justly and impartially, and the judges of such county court, to whom said issue or issues and proceedings thereon shall be transmitted, shall hear, receive and certify the verdict or proceedings thereon before them had, as if the said issue or issues, with the proceedings accompanying the same, had been originally sent to them, by the said court of chancery, county court as a court of equity, or orphans court for trial; *provided, nevertheless*, that such suggestion shall be made as aforesaid, before or during the first three days of the term at which such issues shall be for trial, unless the said issue or issues shall have been previously tried or submitted to a jury in the same county, in which case the suggestion may be made at any time before the jury is empannelled, upon paying the costs of the term.

CHAPTER III.

ORPHANS COURT.

APPRENTICES—PAUPERS—FREE NEGROES.

II. *Be it enacted, by the General Assembly of Maryland,* That the justices of the several and respective orphans court, shall and may bind out as an apprentice every orphan child, (the increase or profits of whose estate, whether real or personal, is or are not sufficient for maintenance, support or education, of the said child,) to some manufacturer, mechanic, mariner, handicraftsman, or other person, at the discretion of the said justices, until such orphan child, if a male, shall arrive at the age of twenty-one years, or if a female, to the age of sixteen years;* and the said justices are hereby directed, in all cases where they can, to make it a part of the contract on the part of the master or mistress of such apprentice, that he or she shall give such orphan child reasonable education in reading and writing, or in reading, writing and arithmetic, to be particularized therein, and also teach such orphan, especially if a male, some useful art or trade, and in all cases supply suitable clothing and maintenance; and the said justices shall and may also bind out as apprentices, such children as are suffering through the extreme indigence or poverty of their parents, also the children of beggars, and also illegitimate children, and the children of persons out of this state, where a sufficient sustenance is not afforded, in like manner, and on like terms; provided always, that when any child is about to be bound out, the parent or parents of said child, if living in the county, shall be summoned to appear before the said justices, and the inclination of the said parent or parents, so far as is reasonable, shall be consulted in the choice of the person to whom the said child shall be bound out; and provided always, that when any child shall be before the court for the purpose of being bound out as an apprentice, if any relation or other person will, with good and sufficient security, enter into bond in the penalty of one hundred pounds, for the due and comfortable maintenance, and for the providing sufficient and proper clothing for such child till of age as aforesaid, and also for the reasonable schooling and education of such child, then the court shall not proceed to bind out such child as aforesaid.—1793, *ch.* 45.

Justices may bind out orphan children, &c

III. *And be it enacted,* That any one or more of the justices of the peace may take any child or children who is or are destitute, or suffering for want of support, or the child or children of beggars, and place the same in the care of some proper person or persons until the next meeting of the orphans court, when the said child or children shall be bound out as apprentices by the said orphans court as aforesaid; and in such case it shall and may be lawful for the said orphans court to make such an allowance as to them shall seem reasonable for the expense incurred by supporting as aforesaid the said child or children, and the

And place out destitute children, &c

* By the acts of 1820, chap. 99; 1821, chap. 124 and 138—The trustees of the poor, and the orphans court of Baltimore county, the Benevolent Society of Baltimore, and the Orphaline Charity School may bind out female children until they arrive at the age of eighteen years.

same shall be levied on and paid by the county to which such child or children shall belong, except the person or persons who have had the care of such child or children, or some other person or persons, can be found who will agree to take the said child or children as an apprentice or apprentices as aforesaid, and pay the expense incurred as aforesaid.—*Id.*

Any father may bind out his child &c.

IV. *And be it enacted*, That any father may bind out his child as an apprentice, on reasonable terms, for any time not longer than till the full age of such child; that is to say, boys to twenty-one, and girls to sixteen years of age, and that the terms of such apprenticeship, with the age of the apprentice, shall be contained and expressed in an indenture, under the hand and seal of the father and master; and that the said indenture shall be lodged by the said master with the register of the orphans court of the county where such master resides, within thirty days after the execution thereof, under the penalty of three pounds current money, to be recovered from said master by indictment in the county court or criminal court of said county, and to be applied to the use and benefit of the poor of said county; and the register of the said orphans court shall and he is hereby obliged to receive and record the said indenture, and he shall be allowed the sum of three shillings current money for each and every indenture so recorded, to be paid by the said master.—*Id.*

Trustees may bind out orphans &c.

V. *And be it enacted*, That it shall and may be lawful for the trustees of the poor of any county in this state, or for any three of them, to bind out any orphan or orphans, or other poor child or children, under their care in the poor-house of said county, to any discreet person applying for said orphan or orphans, or poor child or children, always having a regard to give a preference to tradesmen and mechanics, by obliging said applicants for said orphan or orphans, or other child or children, to sign a good and sufficient indenture to learn said apprentice the occupation that he follows, and to find him in good and sufficient clothing, meat, drink, washing and lodging, and to give such education as masters are obliged to give to apprentices bound by the several orphan courts of this state; and said indenture, when so taken, shall be lodged with the register of the orphans court of the county where such indenture is taken, by any one of the trustees of the poor of the said county, within thirty days after the execution thereof, under the penalty of three pounds for every neglect, to be recovered by presentment in the county court of the county where any such orphan or poor child shall be bound, and applied to the use and benefit of the poor of said county, and the register of said orphans court shall and he is hereby obliged to receive and record the said indenture as other indentures heretofore taken for orphans bound by the court of said county are and have been recorded, and the said clerk shall be allowed the sum of three shillings current money for each and every indenture so received and recorded, to be paid by the master.—*Id.*

Manufacturer,&c. may take apprentice,&c

VI. *And be it enacted*, That it shall and may be lawful for any manufacturer or mechanic to take as an apprentice any male child until he shall arrive at the age of twenty-one years; provided always, that the contract so made shall specify the age of

the child at the time of making the said contract, and that the parent or parents of such child, if living, or if an orphan, the orphans court of such county as the child shall reside in, shall see the contract within two months after its execution, and notify their approbation thereof by an endorsement on the same, and that then the said contract shall be recorded among the records of the orphans court, and the sum of three shillings shall be paid by the master of the said apprentice therefor, and when so recorded the said contract shall be of the same validity as if the same had been originally made with the parents of the said child, or with the orphans court.—*Id.*

VII. *And*, whereas by reason of the inaccuracy of apprentices contracts, disputes frequently arise between the parties, *Be it enacted*, That the justices of the county or criminal courts, on the petition, in writing, of any master or mistress of any apprentice so as aforesaid bound out, shall and may inquire into, hear and determine, any and every dispute that may arise on any contract or agreement so as aforesaid made; and if it shall appear to the said county or criminal court, that the said contract has been violated on the part of the master or mistress, or that the complaint of such apprentice so petitioning as aforesaid is well founded, the said court may proceed to fine the said master or mistress according to the offence, a sum not exceeding ten pounds current money for the first offence, for the second offence any sum not exceeding twenty pounds current money; and the said county or criminal court may, in their discretion, discharge any apprentice because of imposition, or of the ill behaviour of the master or mistress, or of the hardness or unreasonableness of the terms of the contract, and shall provide for the said apprentice a new master, of the same trade or occupation with the first, and if the original contract was hard and unreasonable, such new contract shall be made as the court shall direct; which new master shall be bound to do and perform the contract in the same manner that the original master ought to have done, and shall also pay unto the original master of said apprentice such sum of money as shall be adjudged reasonable by any two or three persons of the same trade or occupation, to be appointed by the court before which court the change of the master shall be made; and the said county or criminal court shall and may, upon the petition of the master or mistress as aforesaid, discharge him or her from his or her contract, because of an incorrigible temper, or of the ill behaviour of the apprentice; and in case the contract, whether defective in form or not, hath been partly executed, the said county or criminal court may award and compel the terms, or any part of the terms, to be performed by the master or mistress, or by the apprentice, as justice and equity may require; and the master or mistress of any apprentice may detain the said apprentice in his or her service till such apprentice is or shall be discharged by the court aforesaid; and the said master or mistress may maintain such action against strangers, as if such apprentice had been legally bound to serve; and if any apprentice shall abscond or run away from his master or mistress, or in any other way absent himself from the service of said

Justices on petition may inquire &c.

master or mistress, the court may, during the whole of the remainder of the time which such apprentice hath to serve, or at any time within three years thereafter, award such compensation to be made by such apprentice to his master or mistress aforesaid, either by service or by payment of money, as justice and equity may require, and may enforce payment of the money so awarded by an attachment of contempt against his person, or *fieri facias* against his goods.—*Id.*

Penalty on persons concealing &c.

VIII. *And be it enacted*, That if any person or persons shall conceal, harbour, or in any way promote or facilitate the running away, of apprentices, he, she or they, shall be subject to the same fines and penalties as the harbourers of servants now are subject to by the laws of this state.—*Id.*

Master, &c. may be summoned, &c.

IX. *And be it enacted*, That any judge or justice of the peace, when he shall receive good information, or upon his own observation, of cruel or improper usage from any master or mistress before him, and may require and take a recognizance of such master or mistress, with reasonable and proper security, to be forfeited in case the said master or mistress shall not appear at the next county or criminal court, to answer and abide the determination of the said court upon any complaint that may be exhibited by such apprentice, or in default thereof may take away such apprentice from his master or mistress, and place the said apprentice, so cruelly used, under the care of some other proper person, who shall be bound to have the apprentice before the next county or criminal court, to abide such determination as shall be made.—*Id.*

Apprentice may be adjudged to serve, &c.

X. *And be it enacted*, That if any apprentice shall be convicted of any offence, in consequence of which judgment shall be entered against him for any fine or penalty, and costs, the court by which such judgment shall be rendered, shall adjudge, and enter on their records, the time for which such apprentice shall serve his or her master or mistress, after the expiration of his or her apprenticeship, in case the said master or mistress will pay the said fine or penalty, and costs, and if the said master or mistress pay the said fine or penalty, and costs, the said apprentice shall be obliged to serve during the time adjudged by the said court.—*Id.*

Not to be carried out of the state, &c.

XI. *And be it enacted*, That no master or mistress of an apprentice, bound out within this state, shall send or carry his or her said apprentice out of the said state; and any justice of the peace, on being credibly informed, or having from his own observation good reason to suspect, that any master or mistress designs to carry or remove his or her apprentice out of this state, except mariners, shall require, demand and take recognizance of such master or mistress, with reasonable and proper security, to be forfeited in case he or she shall directly or indirectly remove or carry such apprentice out of this state; and on such master or mistress's refusal to enter into recognizance, with security as aforesaid, such justice shall discharge such apprentice from his or her master, and provide another master, as heretofore directed by this act.—*Id.*

XII. *And be it enacted*, That all that part of an act of assembly, entitled, An act for the establishment of orphans courts, that directs the summoning of an orphan jury, be and is hereby repealed; and that the justices of the respective county courts shall give in charge to their grand juries, at every county court, to inquire into all matters and things, as are given in charge to the ophans jury.—*Id.*

Part of an act repealed, [Feb. 1777, ch.8.]

XIII. *And be it enacted*, That all apprentices, except those bound to tradesmen or mechanics residing in any town, shall be compelled to perform reasonable labour in wheat, rye and hay harvests only, unless the particular contract shall be otherwise.—*Id.*

May be compelled to labour, &c.

XIV. *And*, whereas apprentices are not, nor is it intended that they should be, assignable, and on the death of the master, the apprentice, although he has been maintained and considerably advanced in the art of his trade, is either bound out to a new master, who derives an immediate profit from his skill and labour, or is suffered to go at large, and it is reasonable that the widow of the deceased master, if he leave any, should derive some benefit from the expense, care and instruction, given the said apprentices, *Be it enacted*, That the widow of any master of a male apprentice, bound agreeably to the directions of this act, whose time shall not have expired at the death of his master, may, with the approbation of the orphans court, if the said apprentice was bound by the trustees of the poor, by the court, or if the said apprentice was bound by his father, with the approbation of the father, assign the whole residue of the contract, on such consideration as she may agree for, to some other person of the same trade with the first master, and the new master, and the apprentice, shall be bound to perform the residue of the contract, as if the new master had been an original party thereto; and the gratuity or consideration, if any, received by the widow for such apprentice's time, shall be to her own use, and shall not be considered as assets of the deceased husband; and where female children are bound out to married men, as the qualities of their wives make a leading motive for such preference, and the girls are chiefly benefitted by the care of the wives, such apprentice girls shall serve out the residue of their time with the widow, on the death of the husband, and the widow shall make good, and strictly comply with, the terms of the contract made with her deceased husband; but if the widow shall not think proper to keep such apprentice girl, then the said widow shall carry the said apprentice to the orphans court of the county, and deliver her up, when she shall be again bound out as heretofore directed by this act.—*Id.*

Widow may assign apprentice, &c.

XV. *And be it enacted*, That in every case where the consent of the father cannot be obtained by the widow of any deceased master to assign the residue of the contract of any apprentice, that it shall and may be lawful for any judge, or any two justices of the peace in the county where the deceased master did last reside, to appoint three persons of the same trade or occupation with the deceased master, any two of which shall have power to value, upon oath, or affirmation, the residue of the contract, and

Judge, &c. may appoint three persons, &c.

the father may make his election, either to pay the widow of the deceased master such valuation, or the widow shall have power to make the assignment without his consent, of the residue of the indenture, with the approbation of the orphans court.—*Id.*

Apprentice shall continue at his home, &c.

XVI. *And*, whereas it often happens, that immediately after the decease of the master of any apprentice, the apprentice leaves his home and employment without any license or authority, not only to his own injury, but also to the detriment of society, *Be it enacted*, That every apprentice, whose master shall die and leave a widow, shall continue at his home and business, as well after as before the death of his master, and shall be subject to the control and directions of the widow, until order be taken therein by the county or criminal court, or justice aforesaid; and the said county or criminal court, or justice, as aforesaid, shall have power and authority to continue any apprentice so long as they or he shall be satisfied that the widow hath it in her power to, and doth, fulfil, the contract made with her husband; and the harbourer or harbourers of any apprentice or apprentices before they are discharged as aforesaid, shall be considered, and shall suffer the same penalties, as the harbourer or harbourers of servants are liable to under the laws of this state.—*Id.*

Master, &c. may apply to the court, &c.

XVII. *And be it enacted*, That either the master or apprentice, upon a petition being filed, may apply to the court for the benefit of a trial by jury, and that the court shall thereupon charge, as the law directs, the attending jury to determine each and all of the allegations contained in the said petition, which may be controverted, any law or usage to the contrary notwithstanding.—*Id.*

Two justices may bind out any child, &c.

Be it enacted by the General Assembly of Maryland, That at any time, when the orphans court of a county be not in session, any two justices of the peace of such county shall and they are hereby empowered to bind out as an apprentice any child which the said court may lawfully bind out, subject to the terms, regulations and restrictions, prescribed by the act to which this is a supplement; *provided always*, that the contract of apprenticeship so made shall be approved and recorded agreeably to the sixth section of the said law.—1794, *ch.* 47.

Their allowance, &c

II. *And be it enacted*, That the said two justices shall each have one quarter of a dollar for every contract of apprenticeship made before them as aforesaid, to be paid by the master.—*Id.*

Orphans courts authorized to bind out children of vagrants, &c.

2. *Be it enacted by the General Assembly*, That the justices of the several and respective orphans courts of this state, and in their recess, the trustees of the poor, or any two justices of the peace, upon information, shall have power, and they are hereby authorized, empowered and directed, to issue a citation to the sheriff or any constable of the county, to cause to be brought before them respectively, the child or children of any pauper or vagrant, or the child or children of lazy, indolent and worthless free negroes, and bind them out as apprentices, agreeably to the provisions of the act to which this act is a supplement: *Provided always*, that the contract of apprenticeship so made shall be approved and recorded agreeably to the sixth section of the said law.—1808, *ch.* 54.

Proviso.

4. *And be it enacted*, That the building so to be erected as aforesaid, shall be called the Surgical Institution of Baltimore, and shall be held, used and occupied, by the said William Gibson and John Owen, as a receptacle of invalids from all parts of the state of Maryland requiring surgical aid; and it shall be the duty of the said William Gibson and John Owen to receive into the said institution, and to administer surgical aid gratis to all such persons as may produce to them a certificate from the orphans court of any county in this state, declaring that the person to whom such certificate is granted is an object of charity; *Provided however*, that the person so applying shall pay a reasonable compensation for his or her board, it being the intention of this act to provide surgical aid for the poor gratis, but not to provide them the means of subsistence.—1815, *ch.* 30.

Surgical institution of Baltimore to administer to those sent by the orphans court.

Proviso.

4. *And be it enacted*, That no minor under the age of twenty-one years shall be indented before the said register, except by his or her parents, or next of kin; and in default of relatives, then by the direction of the orphans court of the county where such emigrant shall arrive.—1817, *ch.* 226.

No emigrant minor to be indented except by parents.

A Supplement to an act, entitled, An act for the better regulation of Apprentices.—1818, *ch.* 118.

Be it enacted, by the General Assembly of Maryland, That the time prescribed by the act to which this is a supplement, providing for the recovery of compensation for the loss of service by the absconding of apprentices, shall, from and after the passing of this act, be extended to five years instead of three years, after the time of service shall have expired.

Time prescribed for compensation for loss of service.

An Act authorizing the Judges of the Orphans Court to bind out the children of free negroes and mulattoes.—1818, *ch.* 189.

1. *Be it enacted by the General Assembly of Maryland*, That the judges of the orphans court of the several counties in this state, are authorized in their discretion, on information being given, or whenever it comes to their own knowledge, that there are any child or children of free negroes or mulattoes not at service or learning a trade, or employed in the service of their parents, to bind and put out such child or children to some useful trade or service, on the same terms and conditions that orphan children are now subject to be bound out, only that the term of service of a female may be extended to the age of eighteen years; and that the judges aforesaid may require as a condition in any indenture, that the said child or children shall be taught to read or write, or in lieu thereof a sum not exceeding thirty dollars shall be allowed in addition to the freedom dues required by law.

Orphans courts authorized to bind out such children.

2. *And be it enacted*, That before the said judges shall proceed to bind out any child or children of the description aforesaid, they shall cause a summons to be issued, requiring the parent or parents of such child or children to appear before the said judges on the day when it is intended to bind out such child or children, and that the said judges shall in all cases consult and gratify the inclination of the parent or parents of such child or children,

Before binding them out to summon parents, &c.

in respect to their choice of a master or mistress, so far as it may seem just and reasonable.

AN ACT relative to female minors.—1820, *ch.* 99.

Poor female children may be bound.

Be it enacted by the General Assembly of Maryland, That the trustees of the poor, or the orphans court in Baltimore city and county, be and they are hereby authorized and empowered, to bind out poor female children in their respective alms or poor houses, until they shall attain the age of eighteen years, or become married.

Authority given to trustees of the poor.

SEC. 1. *Be it enacted by the General Assembly of Maryland*, That it shall and may be lawful for the trustees of the poor of the several counties in this state, or any three of them, to bind out any negro or mulatto child or children under their care in the poor house of said counties, as they are now authorized by law to bind out, without requiring that such education shall be given to the said child or children as masters are obliged to give to apprentices bound by the several orphans courts of this state. 1824, *ch.* 87.

To orphans courts.

2. *And be it enacted*, That it shall and may be lawful for the several orphans courts in this state to bind out any free negro or mulatto child or children that may come or be brought before them to be bound out, in the same manner and with the same provisions as are required by the first section of this act, in the case of children bound out by the trustees of the poor.—*Id.*

Certain contracts confirmed.

1. *Be it enacted by the General Assembly of Maryland*, That all contracts of apprenticeship, heretofore made by justices of the peace as aforesaid, during the sessions of the orphans courts of of the county in which they reside, be and the same are hereby confirmed and made valid; *Provided always*, that this act shall not be construed to extend to any contract of apprenticeship, so made as aforesaid, which shall not have been approved and recorded agreeably to the sixth section of the law, to which this is a further supplement; *And provided also*, that said contracts shall, in all other respects, be in conformity with the terms, regulations and restrictions of said original act, and of the several supplements thereto.—1826, *ch.* 155.

Provisos.

Two justices authorized to bind apprentices.

2. *And be it enacted*, That at any time after the passage of this act, any two justices of the peace of the county, in which the person to be bound out may reside, shall, and they are hereby empowered, to bind out as an apprentice any child which the orphans court of such county may lawfully bind out, subject to the terms, regulations and restrictions, prescribed by the act of seventeen hundred and ninety-three, chapter forty-five, and of the supplements thereto, to which this is a further supplement; *Provided always*, that the contract of apprenticeship so made shall be approved and recorded agreeably to the sixth section of the said law.—*Id.*

Proviso.

Evidence of contract of apprenticeship.

3. *And* whereas it is represented to this general assembly, that the manner of binding apprentices in the several orphans courts in this state is not uniform, and that certain of the said courts use an instrument of writing in the nature of an indenture, and

certain other of the said courts use an instrument in the nature of a recognizance, as evidence of the said contract of apprenticeship, in order therefore to prevent any inconveniences which may hereafter arise therefrom, *Be it enacted*, That the several orphans courts of this state be and they are hereby authorized and empowered, to use an instrument of writing in the nature of an indenture, or an instrument of writing in the nature of a recognizance, as evidence of any contract of apprenticeship entered into in any one of the said courts, according to the provisions of the act of assembly to which this is a further supplement, and of the several other supplements to the said act.—*Id.*

4. *And be it enacted*, That all contracts of apprenticeship heretofore entered into in the said courts, either in the nature of an indenture or of a recognizance, shall not be vitiated for defect of form, but shall be good and valid to all intents and purposes; *Provided*, that the terms of the said contract of apprenticeship be fully and fairly expressed in the instruments of writing which may be entered into for that purpose in the said courts respectively.—*Id.*

Certain contracts not vitiated for defect of form.

Proviso.

1. *And be it enacted by the General Assembly of Maryland*, That the justices of the peace for the city and county of Baltimore, the trustees of the poor of Baltimore city and county, the ward managers of the poor in the city of Baltimore, and the district managers of poor in Baltimore county, for the time being, shall individually have and exercise the power and authority to arrest, or cause to be arrested, and taken up, either in the city or county of Baltimore, any child or children who is or are destitute or suffering for want of support, or may be found begging about the streets of the city of Baltimore, and the child or children of beggars, and to send them, at the expense of the city or county, as the case may be, to the poor house of Baltimore county, there to be supported till they can be bound apprentices, either to farmers, mechanics or other suitable persons, at the discretion of the trustees, and the said trustees are hereby invested with as full powers in relation to the children above mentioned, as they now possess and exercise in regard to other children under their care.—1826, *ch.* 161.

Certain authorities may bind out destitute children, &c.

CHAPTER IV.

ORPHANS COURT.

DISQUALIFICATION OF THE JUDGES.

By the act of 1791, ch. 76, sec. 3, shall not act as attorneys.

By the act of 1812, ch. 191, sec. 4, shall not act as commissioners of the tax.

By the act of 1832, ch. 170, shall not serve as jurymen.

CHAPTER V.

ORPHANS COURT.

MISCELLANEOUS POWERS.

Sheriff's Bond.—Judges of the orphans court may take sheriff's bond. 1806, *ch.* 16—1815, *ch.* 62.

Runaway Slaves.—Their jurisdiction as to runaway slaves.—1817, *ch.* 112, *sec.* 6.

Manumitted Slaves.—Judges of the orphans court authorized to grant annually a permit to manumitted slaves in certain cases.—1831, *ch.* 248, *sec.* 5.—1820, *ch.* 99.

Insolvent Petitioners.—Judges invested with a jurisdiction over petitions by insolvent debtors.—1817, *ch.* 183—1830, *ch.* 130.—1834, *ch.* 216.

Retailers.—Judges may suppress retailers during recess of the county court.—1830, *ch.* 99.

Officer's Fees.—When a sheriff dies, judges may appoint some person to collect the fees which may remain in the sheriff's hands at his death for collection.—1824, *ch.* 202, *sec.* 2.

CHAPTER VI.

REGISTER OF WILLS.

How appointed.

41. That there be a register of wills appointed for each county, who shall be commissioned by the governor, on the joint recommendation of the senate and house of delegates, and that upon the death, resignation, disqualification, or removal out of the county, by any register of wills in the recess of the general assembly, the governor, with the advice of the council, may appoint and commission a fit and proper person to such vacant office, to hold the same until the meeting of the general assembly.—41*st art. Constitution of Maryland.*

Governor to nominate, and by advice of the senate appoint.

Term seven years.

Present officers exempt until 1845.

SEC. 1. *Be it enacted by the General Assembly of Maryland,* That from and after the confirmation of this act, the governor shall nominate, and by and with the advice and consent of the senate, shall appoint the clerks of the several county courts, the clerk of the court of appeals for the Western Shore, the clerk of the court of appeals for the Eastern Shore, the clerk of Baltimore city court, the register of the high court of chancery, and the registers of wills throughout the state, and that the persons so appointed shall continue in office for and during the term of seven years, from the date of their respective appointments: *provided, nevertheless*, that the persons who shall respectively be in office at the time of the confirmation of this act as clerks of the several county courts, as clerks of the court of appeals, as clerk of Baltimore city court, and as registers of wills, shall not be subject in any respect, to the operation of this act, until from and after the first day of February, in the year of our Lord eighteen hundred and forty-five.—1836, *ch.* 224.

This act was confirmed in 1837.

Shall not receive the profits of any other office.

53. That if any governor, chancellor, judge, register of wills, attorney-general, register of the land office, commissioner of the loan office, register of the chancery court, or any clerk of the common law courts, treasurer, naval officer, sheriff, surveyor, or

auditor of public accounts, shall receive, directly or indirectly at any time, the profits, or any part of the profits, of any office held by any other person, during his acting in the office to which he is appointed, his election, appointment and commission, on conviction in a court of law, by the oath of two credible witnesses, shall be void, and he shall suffer the punishment for wilful and corrupt perjury, or be banished this state for ever, or disqualified for ever from holding any office or place of trust or profit, as the court may adjudge.—53*d art. Constitution of Maryland.*

III. *And be it further enacted, by the authority, advice, and consent aforesaid,* That the several clerks of the several courts of record, register of the court of chancery, and register of the commissary's court, within this province, shall be, and they are hereby obliged to deliver to the defendants, if required, full copies, in a fair legible hand, of all the costs of suit recovered against such defendant; and that if any clerk or register shall refuse so to do, he shall forfeit and pay the sum of two thousand pounds of tobacco, to be recovered in the county where such clerk or register resides, and that one-half be applied to the use of the public school in such county, and the other half to the informer that shall sue for the same, to be recovered by action of debt, bill, plaint or information, wherein no essoin, protection or wager of law to be allowed.—1731, *ch.* 15. To deliver copies, &c.

VII. *And be it enacted,* That no register of wills within this state shall demand, take or receive, from any person whatsoever, any fee, gratuity, gift or reward, for giving his advice in any matter or thing relative to his office, under the penalty of fifty pounds current money for every offence.—1799, *ch.* 25. Register not to charge for advice, &c.

The register of wills, where letters testamentary were granted, acting as the agent of the executor in the settlement of an estate, is on a footing with any other member of the community, and entitled to a compensation for his services as agent, but for those rendered in his official character, he can charge nothing but what the fee bill allows him. *Carrol vs Tyler,* 2 *Har. & Gill,* 54.

An Act to prevent any person from acting as an attorney at law in the county where he is register of wills.—1786, *ch.* 10.

Be it enacted by the General Assembly of Maryland, That from and after the twenty-fifth day of March next, no person, being register of wills for any county in this state, shall plead as an attorney at law in any court in the county where he is register of wills, for any person or persons, on any pretence whatsoever; and no register of wills as aforesaid shall exact, extort, demand, take, accept or receive, from any person whatsoever, any fee or fees, gratuity, gift or reward, for giving his advice in any matter or thing that will be transacted in the courts of the county where he acts as register aforesaid, under the penalty of thirty pounds current money for every such offence. Register not to plead, &c.

V. *And be it enacted,* That the register of wills in their respective counties shall be, and by virtue of this act they are authorized and empowered to pass any accounts of the estates of deceased persons where the amount of the inventory of such Registers may pass accounts, &c.

deceased's estate does not exceed the sum of three hundred and fifty pounds: provided nevertheless, that the orphans court, at any time within two terms after the passage or rejection of such accounts, shall have full power and authority to reconsider and alter or reverse the same.—1791, *ch.* 76.

AN ACT to authorize in certain cases the adjournment of the courts therein mentioned.—1795, *ch.* 55.

Register, &c. may adjourn, &c.

Be it enacted by the General Assembly of Maryland, That in all cases hereafter where the general court, the court of appeals, any county court, orphans court, or levy court, within this state, shall not meet at the time prescribed by law, or to which the said courts may respectively stand adjourned, the register or clerks of the said courts respectively shall have full power and authority, and are hereby required, to adjourn their respective courts from day to day, until a meeting of the judges or justices of the said respective courts can be had as prescribed by law, any former law of this state to the contrary notwithstanding.

Make entries.

9. The register of wills in each county, already or hereafter to be appointed agreeably to the constitution, shall diligently attend each meeting of the orphans court in his county, and under their direction make full and fair entries of their proceedings, and shall also make a fair record, in a strong bound book or books, of all wills proved before him, or the said court, or authenticated according to this act, and of all other matters by law directed to be recorded in the said court, or in his office; he shall make out and issue every summons, process or order of the court, and shall, in every respect, act under their control and direction, as the clerk of a court of law is under the direction of the said court of law; and he shall give out, and certify under the seal of the court, any copy of any part of the proceedings in the court, or in his office, which any person may demand; and he shall be entitled to a reward for any service by him done, according to the table of fees now or hereafter to be settled by law.—1798, *ch.* 101, *sub ch.* 15.

Attend at stated times

10. The said register of wills shall attend on every Tuesday and Saturday at the town or place where the orphans court is held, unless prevented by sickness, accident or necessity, for the dispatch of office business; he shall lodge every original paper and record by him made up in some repository of the court house of the county, or in such other place of safety which the said court may appoint; the levy court of the county shall provide and keep in repair the said repository at the county's charge.—*Id.*

11. Every person hereafter appointed register of wills, before he acts as such, shall before the said court, or some judge or justice, qualify, by repeating and subscribing the declaration aforesaid, and taking, repeating and subscribing, the aforesaid oaths of allegiance and fidelity, and by taking, repeating and subscribing the following oath of office; 'I, A. B, do swear, (or solemnly, sincerely and truly affirm,) that I will diligently, honestly and faithfully, execute the office of register of wills, in —— county, according to the best of my skill and judgment; so help me GOD.'—*Id.*

4. *And be it enacted*, That the registers of wills in their respective counties, in the recess of the orphans court, shall and they are hereby authorized and empowered to pass any account against the estate of any deceased person where the amount of such account or claim doth not exceed the sum of fifty dollars. 1802, *ch.* 101.

Registers may pass accounts under $50.

2. *And be it enacted*, That it shall also be the duty of the said registers to give daily attendance at their offices, either in person or by deputy, for the purpose of discharging the duties incident thereto, except on Sundays, and unless prevented by sickness, or some unavoidable accident.—1804, *ch.* 39.*

Registers to give daily attendance.

3. *Provided nevertheless, and be it enacted*, That nothing herein contained shall be construed, or have effect in any manner, to authorize a deputy to transact any part of the business or duties of the said office which is or may by law be required to be executed by the register in person, and it is hereby declared to be the duty of the said registers, at all times after the passage of this act, to attend at their respective offices, in person, unless prevented as aforesaid, at least two days in every week.—*Id.*

Proviso.

2. *Be it enacted by the General Assembly of Maryland*, That from and after the first day of June next, it shall not be lawful for any person or persons, except the clerks of the county courts in the several counties in this state, or register of wills, where any negro or negroes have been freed by last will and testament, to grant certificates of freedom to any free negro or negroes, and the said clerks and registers are hereby enjoined, when called upon by any negro entitled to freedom, residing in, or belonging to, their respective counties, for a certificate thereof, to grant the same under the seal of their respective offices, and to set forth therein the height, age, complexion, the time such negro became free, the place where he or she, as the case may be, was raised, and such mark or marks as may appear to such clerk or register to be notable in such negro, so applying for his or her certificate of freedom as aforesaid; and the said clerk or register shall keep a registry of each and every certificate granted by them, or either of them, to any negro or negroes to whom such certificate have been granted.—1805, *ch.* 66.

Certificates of freedom to be granted only by the clerks of the county courts and registers of wills.

The manner of granting them, and a registry thereof.

3. *And be it enacted*, That if any person or persons, other than the clerks or registers as aforesaid of the several counties in this state, shall give or grant any certificate of freedom to any negro or negroes, he, she or they, shall, upon an indictment, and being found guilty thereof, either by confession or verdict of a jury, forfeit and pay not exceeding five hundred dollars for each and every offence, to be applied to the use of the county where such person shall reside; and if any clerk or register in any county in this state shall grant a certificate of freedom to any negro or negroes not entitled to freedom, knowing such negro or negroes not to be entitled to freedom, or to any free negro or free negroes, except such as belong to, or were manumitted or freed according to the laws of this state, in his or their respective counties, shall

Penalty on persons other than clerks, &c. for granting certificates of freedom, and on clerks, &c. for granting them improperly.

*This act extends only to the counties of St. Mary's, Kent, Charles, Talbot, Dorchester, Worcester, Harford, Washington and Montgomery.

upon an indictment and conviction thereof, forfeit and pay not exceeding five hundred dollars for each and every offence, to be applied as aforesaid.—*Id.*

Fees to the clerks and registers.

7. *And be it enacted*, That for each and every certificate of freedom granted under this act, the clerk or register, as the case may be, shall receive fifty cents, as a compensation for his trouble.—*Id.*

Register not entitled to receive any fee in certain cases.

5. *Be it enacted*, That hereafter no register of wills, in the several counties of this state, shall be entitled to receive any fee for entering the appearance of the state to any proceedings in any of the orphans courts of this state, unless when a citation issues, nor for entering the continuance of any proceedings in any of the said courts, except for the entering the same at the term at which the said continuance was granted.—1807, *ch.* 136.

Final discharges, &c. of executors &c. may be recorded.

1. *Be it enacted by the General Assembly of Maryland*, That all receipts, acquittances, releases or final discharge, from any heir, representative or legatee, of full age, or other persons authorized to execute the same, to any guardian, executors or administrator, which shall have been acknowledged before any justice of the peace, or register of wills of the county wherein such heir, representative, legatee, or other persons authorized to execute the same, resides, may be recorded; and it shall be the duty of the register of wills of the county where such guardian was appointed, or such executor or administrator obtained letters testamentary or letters of administration, to record any such receipt, acquittance, release or final discharge, produced to be recorded, in a well bound book to be kept for that purpose.—1809, *ch.* 168.

Release, &c by a non-resident, acknowledged and certified, may be recorded.

3 *And be it enacted*, That any receipt, acquittance, release or final discharge, from any heirs, legatee, representative of full age, or other persons authorized to execute the same, to any executor, administrator or guardian, by a non-resident of this state, acknowledged as aforesaid in the town, city, county or place, where such person may reside, with a certificate of such acknowledgment, and seal of office thereto annexed, may be received and recorded by such register, and placed on his record, as other receipts, acquittances, releases or final discharge may be recorded, and admitted in evidence as aforesaid; and such register of wills may ask, demand and receive, such fee for recording the same, as is allowed by law in other cases of a similar nature.—*Id.*

In recess of court register may receive inventories, &c.

5. *And be it enacted*, That in the recess of the sessions of orphans courts the register of wills in the several counties of this state, upon application, may receive inventories and accounts of sales, examine vouchers, and state guardians, executors and administrators accounts, subject to the review and final passage or rejection by the orphans court.—1816, *ch.* 203.

To take probats against deceased's estate.

6. *And be it enacted*, That the registers of wills shall be and are hereby authorized to take probats of accounts against deceased persons estates that are proper to be brought before them, or before the orphans court, for passage or settlement in the respective counties in which they act as registers, and to receive six and one quarter cents for each probat so taken.—*Id.*

11. *Provided nevertheless and be it enacted*, That nothing herein contained shall be construed or intended to lessen or to take

away the duty of the register of wills in each and every [county] within this state, to record wills, inventories, accounts, and other instruments and papers returned and filed, or to be returned and filed in his office, but all such wills, inventories, accounts, and other instruments and papers, now required by law to be recorded, shall be recorded under the direction, and subject to the inspection and examination of the judges of the orphans courts, by the periods and in the manner required by this act. 1817, *ch.* 119.*

Not to be construed to lessen duty of registers to record wills, &c.

4. *And be it further enacted*, That hereafter it shall be lawful for the register of wills of the several counties in this state, to grant or issue letters of administration, during the recess of the orphans court of the several counties.—1818, *ch.* 217.

Register to grant letters of administration during recess of court.

5. *And be it enacted*, That all letters of administration which have been heretofore granted by the register of wills in the recess of the orphans courts of the several counties in this state, and all proceedings under such letters of administration, are hereby confirmed, and made as valid as they could or would have been, had such letters of administration been granted by the orphans courts of the several counties.—*Id.*

Letters heretofore granted by register in recess of court, confirmed.

2. *And be it enacted*, That in all cases whereby the laws and usages of this state, or by the usages of the said offices, the registers of wills of the several counties of this state are required to enroll wills, codicils, inventories, lists of debts sperate and desperate, and other papers and proceedings necessary to be enrolled, that the registers of wills of the several and respective counties of this state, shall not be entitled to collect for enrolling the same, by execution, any fees until the said wills, codicils, inventories, lists of debts sperate and desperate, and other papers and proceedings, shall have been actually enrolled in books to be kept by them for enrolling the same.—1819, *ch.* 155.

Not to collect fees by execution until papers are enrolled

Sec. 1. *Be it enacted by the General Assembly of Maryland*, That on the first day of August next, and on or before the first day of August in every second year thereafter, the treasurers of the state on each shore, the clerks of the court of appeals, the clerks of the several county courts, the clerk of the city court of Baltimore, the register in chancery, and the registers of wills of the several counties in this state, be, and they are hereby required to renew the several bonds now given by them to the state, with sufficient sureties, the bond to be executed by the treasurers, to be approved by the governor and council for the time being, the bonds executed by the clerks of the court of appeals to be approved by the judges of the court of appeals, the bonds to be executed by the clerks of the county courts, to be approved by the judges thereof, the bond to be executed by the clerk of the city court of Baltimore, to be approved by the judges thereof, the bond to be executed by the register in chancery to be approved by the chancellor, and the bonds to be executed by the registers of wills, to be approved by the judges of the orphans court, and the said bonds so as aforesaid to be executed shall be recorded in the county court office of the county in which the party so executing the bond shall live.—1823, *ch.* 195.

Bonds to be renewed.

* This law relates to judicial proceedings.

Penalty for neglect.

2. *And be it enacted*, That on the default of any of the officers aforesaid, to execute the bond required by this act, within the time required by this act, such defaulter shall be subject to a penalty of one thousand dollars to be recovered by indictment in the name of the state in the county court of the county in which such officer may reside.—*Id.*

Orphans court or register in recess authorized to take probate, of any will, having relation to real as well as personal estate.

Which as to real estate shall be but prima facie.

SEC. 1. *Be it enacted by the General Assembly of Maryland*, That the orphans courts, and in their recess, the registers of wills of the several counties in this state, be, and they are hereby authorized and empowered to take the probat of any will, testament or codicil, whether the same has relation to real or personal estate, or to both real and personal estate, in the same manner, that the original act, to which this is a further supplement, authorizes the said courts or registers, to take the probat of wills, testaments and codicils, containing any disposition relative to goods, chattels or personal estate, which said probat as concerns real estate, shall be deemed and taken only as prima facie evidence of such will, testament or codicil.—1831, *ch.* 315.

Recess of court construed.

SEC. 14. *And be it enacted*, That a recess of any orphans court in this state, shall be deemed and taken to be not only such days as they may not hold a court, but also such parts or portions of a day, as they may not be in actual session; *And be it further enacted*, That all the acts heretofore done and performed by any of the registers of wills of the several counties in this state, during the periods in which such courts were not actually in session, shall be as valid and effectual, to all intents and purposes, as if such acts had been done and performed during the recess of such courts, any thing in any former laws contained to the contrary notwithstanding.—*Id.*

Limit as to citations.

SEC. 15. *And be it enacted*, That no register of wills shall, *ex officio*, issue any citation to any guardian for the rendering of an account where the annual income or profits of the estate of the ward shall not exceed fifty dollars.—*Id.*

All wills to be retained in register's office.

Produced on trials of suits, &c.

SEC. 16. *And be it enacted*, That every will of which probat shall have been taken by any orphans courts, shall be retained and preserved in the office of the register of wills of the county, and shall not be delivered out of such office to any person or persons whomsoever; and every issue of *devisavit vel non*, sent from the court of chancery, or any county court, sitting as a court of equity, shall be tried in the county of the office aforesaid, at which trial said will, may be adduced in evidence under care of said register, or of any person in that behalf by him deputed, under a *subpœna duces tecum*, issued on special order of the court holding such trial; and in like manner, such will may be produced in evidence on the trial in any court of this state, of any issue involving the said will, and requiring its production in the opinion of said court; but nothing herein contained shall authorize the taking or keeping said will at any time out of the care and custody of the said register, or of the person deputed as aforesaid.—*Id.*

CHAPTER VII.

WILLS,

HOW MADE AND THEIR EFFECT.

1. All lands, tenements and hereditaments, which might pass by deed, or which would, in case of the proprietor's dying intestate, descend to, or devolve on his or her heirs or other representatives, except estates tail, shall be subject to be disposed of, transferred and passed, by his or her last will, testament, or codicil, under the following restrictions.—1798, *ch.* 101, *sub. ch.* 1. How wills shall be made and their effect.

2. No will, testament or codicil, shall be effectual to create any interest or perpetuity, or make any limitation, or appoint any uses, not now permitted by the constitution or laws of the state.—*Id.*

3. No will, testament, or codicil, shall be good and effectual for any purpose whatever, unless the person making the same be, at the time of executing or acknowledging it as hereafter directed, of sound and disposing mind, and capable of executing a valid deed or contract. No will, testament or codicil, shall be good and effectual to pass any interest, or estate in any land, tenement or incorporeal hereditament, unless the person making the same, if a male, be of the full age of twenty-one years, and if a female, of the full age of eighteen years.—*Id.*

4. All devises and bequests of any lands or tenements, devisable by law, shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of said devisor, by three or four credible witnesses, or else they shall be utterly void and of none effect; and moreover, no devise in writing of lands, tenements or hereditaments, or any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence, and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn or obliterated by the testator, or his directions in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same, any former law or usage to the contrary notwithstanding. *Id.*

The 4th section is a literal transcript from 29 Charles 2, ch. 3.

In the case of *Davis vs. Calvert & others*, 5 *Gill & John.* 249, the court of appeals delivered the following opinion:

'The third section of the first sub-chapter of the act of 1798, ch. 101, provides 'that no will, testament or codicil, shall be good and effectual for any purpose whatsoever, unless the person making the same be at the time of executing or acknowledging it, of sound disposing mind, and capable of executing a valid deed or contract.' These latter words are of importance in the investigation, touching the mental capacity of a testator. He who is not competent to execute a valid deed or contract is under the testamentary system of the state, incompetent to make a valid will or testament.

'The testator's capacity is to be determined by the condition of his mind

at the time of his executing the will or testament; and for the purpose of shedding light upon that, evidence of its condition, and of his bodily imbecility, both before and after the period of his executing or acknowledging his will may be produced. It is not of itself sufficient to avoid a will or testament, that its dispositions are imprudent and not to be accounted for. But a will or testament may by its provisions furnish intrinsic evidence involving it in suspicion, and *tending* to show the incapacity of the testator to make a disposition of his estate with judgment and understanding, in reference to the amount and situation of his property, and the relative claims of the different persons who should have been the objects of his bounty.

'The contents of a will, the manner in which it was written and executed, the nature and extent of the estate of the testator, his family and connections, their condition and relative situation to him, the terms upon which he stood with them, the claims of particular individuals, the condition and relative situation of the legatees or devisees named, the situation of the testator himself, the circumstances under which the will was made, are all proper to be shown to a jury, and often afford important evidence in the decision of the question of a testator's capacity to make a will.

'A will may be avoided also for fraud, importunity and undue influence.

'Importunity and undue influence may be fraudulently exerted, but they are not inseparably connected with fraud, nor is it every degree of importunity that is sufficient to invalidate a will or testament. Honest and moderate intercession, or persuasion, or flattery unaccompanied by fraud or deceit, and where the testator has not been threatened or put in fear by the flatterer, or persuader, or his power, or dominion over him will not have that effect, but there may be great and overruling importunity and undue influence without fraud, which, when established, may and ought to have the effect (under circumstances) to avoid a will.

'That degree of importunity or undue influence which deprives a testator of his free agency, which is such as he is too weak to resist, and will render the instrument not his free and unconstrained act, is sufficient to invalidate a will; and this not only in relation to the person alone by whom it is so procured, but as to all others who are so intended to be benefitted by his undue influence.

'If any part or clause of a will was first suggested to a testator by any other person and adopted by such testator, such adoption ought not to be the result of his incapacity or weakness of mind, nor of fraud, circumvention or undue influence, and whether it is so, is for the jury from all the facts and circumstances to decide.

'To invalidate a will on the ground of fraud or undue influence, it is necessary that it should have been induced by fraud, circumvention, deception, imposition or undue influence operating upon and controlling the testator as it was executed, of which and in what degree he was so influenced and controlled is for the jury to decide; and it is not necessary that such fraud and undue influence should have been immediately and directly exerted at the particular time at which the will was made, nor is it material by whom practised.

'In the trial of issues formed by the orphans court upon a caveat to a will, the evidence is not necessarily confined to the facts expressly put in issue, but any fact which tends to prove the fact in issue may be given to the jury. So when the nature of the case makes an inquiry into the true paternity of children, described in the will as the children of the testator, necessary, as where the fraud is alleged to consist in inducing the testator to believe that such children were his own, when they were not, and so directing his bounty to them, that fact as a part of the machinery of the fraud may be examined into; and upon the same principle the capacity of devisees named in a will to take the property devised, and the character and consequences of devises over in case of the incapacity of the devisees first named to take, as where they are slaves, may become material for the consideration of the jury.'

Any one has a right, by fair argument and persuasion, or by virtuous influence, to induce another to make a will in his favour. *Miller vs. Miller.* 3 *Sergeant & Rawle*, 267. *Small vs. Small.* 3 *Green*, 420.

A will procured by kindness, attention and importunate persuasion, which

delicate minds would shrink from, would not be set aside on such grounds alone. 3 *Serg. & Rawle*, 270.

Declarations of a testator, before and after the time of making a will and afterwards, if so near as to be a part of the *res gestæ* are admissible to shew fraud in obtaining a will; but not declarations at any distance of time after making of the will, especially where the will has been in the testator's possession. *Smith vs. Fenner.* 1 *Gallis*, 170.

Declarations of a testator as to his intentions to alter his will, and of his being prevailed on not to do so, are not admissible to shew that the will was fraudulently prevented from being revoked.—*Idem.*

When a question arises, whether an alteration in a will was made by the original draftsman or by a stranger, evidence of other writings proved by witnesses, and also of witnesses, are admissible, to shew that the peculiarities of the alteration, are such as the party frequently used, in his ordinary and genuine hand-writing.—*Ibid.*

An alteration of a pecuniary legacy in the will, by a legatee or a stranger, will not avoid the will as to other bequests.—*Ibid.*

It is not necessary for a devisee to prove that the will was read to the testator; in general a knowledge of the contents is presumed. But if the testator was incapable of reading, or if a reasonable ground was laid for believing it was not read to him, or that there was fraud in the transaction it is necessary for the devisee to satisfy the jury that the will was so read, or that the contents were known by the testator. *Harrison vs. Rowan.* 3 *Wash. C. C. Rep.* 580.

The doctrine of constructive presence of a testator has been carried very far, and it has been decided that if the witnesses were in view, and where the testator *might*, or had the capacity to see them with some little effort, if he had the desire, though in reality he did not, they were deemed subscribing witnesses in *his presence*. If the testator produces a will already signed to the witnesses, and acknowledges his signature in their presence, it is a sufficient compliance with the act, as it is unnecessary for the testator actually to sign the will in the presence of the witnesses. Nor is it necessary that the witnesses should attest in the presence of each other, or that they should attest every page, or sheet, or that they should know the contents, or that each page should be particularly shown to them. The testator must have mental knowledge of the fact, that the witnesses are in his presence. In *Knight vs. Priee*, in *Doug* 241, where the witnesses attested the will while the testator was *corporeally* present, but in a state of insensibility, it was held to be a void attestation. The subscribing witnesses need not attest at one time, nor all together. 4 *Kent Com.* 515.

In the case of *Russel vs. Falls*, in 3 *Harris & McHenry*, 462 (cited and recognized in *Edelin vs. Hardy*, 7 *Harris & John.* 61,) upon the trial of an issue *devesavit vel not*, sent from the court of chancery to the general court, 'what is a subscribing of a witness in the presence of the testator?' underwent a most elaborate discussion by some of the most eminent men of the bar. The general court instructed the jury in the following manner, 'all the necessary forms, to the due execution of the will in this case, are agreed to have been complied with, except that of the witnesses subscribing as such in the presence of the testatrix—evidence has been given touching the situation of the testatrix, at the time of the witnesses subscribing, if from the evidence you are of opinion that the situation of the witnesses and of the testatrix at the time of signing was such that the testatrix *might* have seen the witnesses sign as such, the execution of the will was proper and legal, although the testatrix did not actually see the witnesses subscribe their names, otherwise not.' The court explained their direction to the jury and informed them 'that it was necessary, the testatrix at the time of attesting the said will by the witnesses, might without changing her position have seen them sign the same.'

The court certified to the chancellor, 'that by our (preceding) direction to the jury, we intended to convey and instruct the jury by the words 'without changing her position,' that it was necessary that the testatrix at the time of attesting the said will by the witnesses, might without getting out of the bed where she then lay, have seen them sign the same.'

Mason & others, lessee, vs. Harrison & Boggs, 5 *Har. & John*, 480. In this case the will was attested by three witnesses, who proved, that the testa-

tor at the time of making the same, appeared to be perfectly in his senses, that a pen was put into his hand, and he said he must make his mark, that one of the witnesses assisted him to make his mark, by pressing his finger on the pen, that the witness did not perceive that the testator made any effort whatever in making the mark, but he appeared to understand perfectly what he was about, that the testator and witnesses were all in the same room when they commenced subscribing their names, but there were some doubts whether he was in the room when the last witness had finished subscribing his name, that the will was taken into the room where the testator had been carried, and he was asked if it was his will, and he answered yes—that the testator when the witnesses subscribed their names had his back to the table, and he might have seen them sign their names if he had turned his head round, and one of the witnesses believed he could have turned his head or body, but another of the witnesses thought he could not have turned his head from his debility. The county court held, that the execution of the instrument of writing was not according to law, and had not been sufficiently proved. On appeal, this judgment of the county court was reversed, but the court of appeals gave no opinion.

Edelin vs. Hardy's lessee, 7 *Har. & John.* 61. In this case, it appeared, that the will was signed by the testator in the presence of the witnesses, but that they at his request took it into an adjoining room to attest, between which, and the room in which the testator was, there was a plank partition, and after attesting it, it was carried back to the testator, and he informed of the attestation and approved of it, it was held by the county court of Prince George's, that prima facie, the will was not legally executed. Appeal prayed to the court of appeals—the opinion of the county court affirmed. Mr. Justice Stephens saying: 'It is true, it is not essential that the testator should actually see the witnesses attest his will, but it is necessary that he should be in a situation which would give him the capacity of doing so if he should desire it.' He cited and recognized the preceding case of *Russell vs. Falls.*

CHAPTER VIII.

WILLS OF INFANTS.

This act does not profess to prescribe a testamentary age for wills of *personal property.* Infants over the age of fourteen, if males, and over twelve, if females, may make a will of personal property. No objection can be made to a will made by an infant, of the above ages, merely for the want of age, if the testator had sufficient discretion. If the infant has attained the last day of twelve or fourteen years, the testament made by him or her in the very last day of their several ages as aforesaid, is as good and lawful as if the same day was already expired, likewise if after they have accomplished these several years of fourteen or twelve, if he or she approve of the testament made during their minority, the same by this new will or declaration is made strong or effectual. 1 *Williams' Ex.* 14. 2 *Blackstone's Com.* 400. 4 *Kent's Com.* 506.

CHAPTER IX.

WILLS OF MARRIED WOMEN.

A married woman is not only utterly incapable of devising lands, but she is also incapable of making a testament of chattels without the assent of her husband. 2 *Black. Com.* 401. 4 *Kent's Com.* 505—and the assent must be given to the particular will.—It may be recalled before probate. Where personal property is given to the wife for her sole and separate use, she may make a testament thereof without the assent of her husband—*Id.* A married woman having no separate property makes a will, (which is in the hand-writing of her husband,) disposing of some of her property. He proves the will, pays a legacy, and suffers the other executors to pay others. It was decided that the will was valid and would carry the property bequeathed from the representatives of the husband, although there was no assent in

writing by the husband, other than that of having written the will. 2 *Dess. Chancery Reports*, 66. A married woman, by a deed of settlement, vesting her real estate in trustees, may be clothed with the power of making a will thereof. In such case, the will must be executed with the same solemnities as if she were a *feme sole*. 1 *Williams on Ex.* 40, *and the authorities there cited.*

CHAPTER X.

WILLS,

HOW AUTHENTICATED OR PROVED.

How wills shall be authenticated or proved.

1. If any person to whom a will or codicil hath been or shall be delivered by the party making it for safe custody, shall alter or destroy the same, without the direction of the said party, or wilfully secrete it for the space of six months after the death of the party shall be known to him or her, on conviction thereof the person so offending shall be sentenced to such punishment as is inflicted by law in cases of grand larceny.—1798, *ch.* 101, *sub ch.* 2.

The punishment for this offence is enlarged by the act of 1809, *ch.* 138, *sec.* 8.

Wills to be delivered to the register.

2. It shall be lawful for any private person, in whose possession or custody a will or codicil shall be, after the death of the testator or testatrix, to open and read the same in the presence of any near relatives of the deceased, who may conveniently have notice thereof, and of other persons, and immediately thereafter to deliver the said will or codicil to the register of wills, or the register or clerk of any office in the county authorized to record wills, whose duty it shall be to keep the same safe, until proceedings may be had for proving the same in the said office, or until it be demanded by an executor, or other person authorized to demand it, for the purpose of having it proved according to law.—*Id.*

Penalty for not doing so.

3. If any private person, in whose possession or custody, a will or codicil shall be, after the death of the testator or testatrix, shall wilfully neglect to deliver the same to the register of wills, or the register or clerk of any office proper for recording wills in the county where the said person resides, or where it is proper to prove the same, or to some executor named in the will, for the space of three calender months after the death of the testator or testatrix shall be known to the said person, he or she thus offending, shall be subject, on conviction in a court of law, to such fine as the court shall in their discretion think proper.—*Id.*

Copy evidence.

4. An attested copy, under the seal of office, of any will, testament or codicil, recorded in any office authorized to record the same, shall be admitted as evidence in any court of law or equity, provided that the execution of the original will or codicil be subject to be contested until a probat hath been had according to this act.—*Id.*

In what county proved.

5. Any will or codicil, containing any disposition relative to goods, chattels, or personal estate, may be proved in the county

where most of the witnesses reside, or in the county in which letters testamentary or of administration may be granted.—*Id.*

Register may take probat in the recess of court.

6. If any will or codicil, making any disposition relative to goods, chattels, or personal property, or rights, or appointing an executor, be exhibited for proof to the register of wills in the county wherein the will may be proved, in the recess of the court, and any of the next relations of the deceased shall attend, and make no objections, or enter no caveat, or if it shall appear that reasonable notice hath been given to such of the next relation as might conveniently be therewith served, of the time of exhibiting the said will or codicil, and no person shall object, or enter a caveat, the register shall thereupon proceed to take the probat, and to grant letters testamentary accordingly.—*Id.*

Admitted to probat forthwith.

7. If any such will or codicil, respecting personal property or appointing an executor, be exhibited for probat to the orphans court of the county where the same may be proved, and any of the next relations of the deceased shall attend, or if notice shall appear to have been given as aforesaid, and no caveat shall have been made against the said will or codicil, the said court may forthwith proceed to take the probat of such will or codicil.—*Id.*

Notice to be given to relations.

8. If any such will or codicil, respecting personal property, or appointing an executor, be exhibited to the orphans court, and none of the near relations of the deceased shall attend, and no notice shall appear to have been given, the said court may either direct summons to the said near relations, or some one or more of them, to appear on some fixed day, to shew cause wherefore the will or codicil should not be proved, or direct such notice to be given in the public papers, or otherwise, as they may think proper; and if no objection shall be made, or caveat entered on or before the day fixed, the said court, or the register of wills in their recess, may proceed to take the probat of such will or codicil; but if objection shall be made, on or before the day appointed, the said court shall have cognizance of the affair, and shall determine according to the testimony produced on both sides.—*Id.*

Enter a caveat.

9. If any person whatever shall enter a caveat against any such will or codicil respecting personal property, or appointing an executor, either before or after it shall be exhibited to the register of wills or orphans court, the said caveat shall be decided by the said court.—*Id.*

No letters to be granted pending such caveat.

10. In case any person shall enter a caveat against any will or codicil, respecting personal property, or appointing an executor, of which probat shall have been taken by the register as aforesaid, no letters testamentary shall be granted, until a determination shall be had in the orphans court.—*Id.*

Will rejected, not to be received in another county.

11. In case the adjudication of any orphans court, to whom any such will or codicil, respecting personal property, or appointing an executor, shall be exhibited for probat, shall be against the said will or codicil, it shall not be received for probat in any other county; provided nevertheless, that either party conceiving him or herself aggrieved by the decision of the said court, relative to the probat, may, within three days after such decision, enter an appeal to the court of chancery, or the general court of the shore

whereon such orphans court is held; and the said appeal shall stay further proceedings of the orphans court, provided an attested copy of the whole proceedings, under the seal of the office, be filed in the said chancery court, or general court, within sixty days thereafter; and the decree of the chancery court, or general court, to be given on the transcript only, shall be final and conclusive; and the orphans court shall proceed according to the said decree, an attested copy whereof shall be transmitted, under seal, to the orphans court.—*Id.* Appeal provided.

The appeal granted in this section is remodelled, by the act of 1808, chap. 204—which vide ante page 15.

12. If no objections shall be made to the probat of a will or codicil, respecting personal property, or appointing an executor, or no caveat shall be filed against the same before probat, it shall not be necessary to examine all the witnesses, unless they shall voluntarily attend, but the probat may be made on such proof as shall be sufficient to give efficacy to a will or codicil for passing personal property; provided that every executor, or other person exhibiting a will, shall be examined on oath, or affirmation as the case may be, whether or not he or she knows of any other will or codicil, and in what manner the will or codicil exhibited came to his or her hands.—*Id.* If no caveat, witnesses need not attend.

The proof required for the probat of a will of personal property in the orphans court has not been regulated by any statute of our state—the ecclesiastical courts of England, have adopted the following practice: 'Where a will is perfect on the face of it, it is only required for probat of it, in common form, where there is no subscribing witness, that an affidavit should be made by two persons that the signature to that will being in the hand-writing of the testator. If the will is attested by one subscribing witness, the affidavit of one person is then only required to the hand-writing; and if it be attested by two subscribing witnesses, then the oath of the executor is alone sufficient, without any affidavit of the writing.' 1 *Will. Ex.* 189.

It may happen that a subscribing witness is a legatee under the will, and in such case the statute of George II., chap. 6, (making the devise void, and rendering the witness to the will competent,) does not apply to wills of personal property, and therefore, the witness does not lose his legacy, the party is considered as no witness, being incompetent from interest. If of two subscribing witnesses to a will, one is a legatee, the affidavit of one person is required to the probat of the will, in common form, as if the will was attested by one subscribing witness only; if both subscribing witnesses are legatees, the affidavit of two persons to the hand-writing of the testator is then required, just as it would be if the will was wholly unattested.—*Id.*

13. If the probat of any will or codicil be taken as aforesaid, without contest, any person, before letters testamentary, or of administration with a copy of the will, shall be actually granted, may file a petition to the court, praying that the case be again examined and heard, and thereupon the orphans court shall delay the granting of letters, until a decision shall be had on the said petition; and in case letters shall have been granted, and any person shall file such petition, and the court, on hearing both sides, that is to say, the petitioner and the grantee of such letters, shall decide against the probat, the letters aforesaid shall be revoked, and the power of the party, under the said letters, shall cease; and the said will shall not be proved in any other county, Will may be reheard on petition.

unless the decision be reversed by the court of chancery or general court;* and no nuncupative will shall be proved within fourteen days after the death of the testator, unless his widow (if any) and some one of the next of kin, have been summoned to contest the same, if they please.—*Id.*

Orphans court or register in recess authorized to take probat of any will, having relation to real as well as personal estate.

Which as to real estate shall be but prima facie.

SEC. 1. *Be it enacted by the General Assembly of Maryland*, That the orphans courts, and in their recess, the registers of wills of the several counties in this state, be, and they are hereby authorized and empowered to take the probat of any will, testament or codicil, whether the same has relation to real or personal estate, or to both real and personal estate, in the same manner, that the original act to which this a further supplement, authorizes the said courts or registers, to take the probat of wills, testaments and codicils, containing any disposition relative to goods, chattels or personal estate, which said probat as concerns real estate, shall be deemed and taken only as prima facie evidence of such will, testament or codicil.—1831, *ch.* 315.

All wills to be retained in register's office.

Produced on trials.

SEC. 16. *And be it enacted*, That every will of which probat shall have been taken by any orphans court, shall be retained and preserved in the office of the register of wills of the county, and shall not be delivered out of such office to any person or persons whomsoever; and every issue of *devisavit vel non*, sent from the court of chancery, or any county court sitting as a court of equity, shall be tried in the county of the office aforesaid, at which trial said will, may be adduced in evidence under care of said register, or of any person in that behalf by him deputed, under a *subpœna duces tecum*, issued on special order of the court holding such trial; and in like manner, such will may be produced in evidence on the trial in any court of this state, of any issue involving the said will, and requiring its production in the opinion of said court; but nothing herein contained shall authorize the taking or keeping said will at any time out of the care and custody of the said register, or of the person deputed as aforesaid.—*Id.*

One witness sufficient to prove all the essentials required by the statute, but if they are all dead, the hand-writing of the testator and of all the witnesses must be proved, and where the witnesses set their marks, there must be proof that such marks were made by them. 1 *Har. & John.* 1, *Collins vs. Elliott.* 1 *Har. & John.* 399, 402, *Collins vs. Nichol.* Declarations of a deceased witness that he attested the will, not evidence of its execution.—*Id.* nor of the testator himself that he made a will—nor of the writer that he had written such a will.—*Id.* A will repudiated by the orphans court, and the decree affirmed upon appeal, is still open for litigation in an ejectment. *Massey vs. Massey*, 4 *Har. & John.* 145.

Whether the husband of a devisee having released his interest under the will, was a competent witness to prove the same, underwent a most elaborate discussion in the general court, by the then most prominent members of the bar, in the case of *Shaffer's lessee vs. Corbett*, 3 *Har. & McHen.* 533.

The court decided in the language of Judge Chase, 'that a legatee is competent or incompetent to prove the will according to his retaining or releasing his interest under the will, at the time he is called to prove the will.' See *Brayfield vs. Brayfield.* 3 *Har. & John.* 208.

See *Snelgrove vs. Snelgrove*, 4 *Dess.* 483, where the same point is most elaborately discussed, and in which the court decided that the writer of the will

* See ante page 15.

writing his own name in the body of the will, in the presence and by direction of the testator, as executor, but not attesting the same as a witness, is not such an attestation as is required by the statute. The three witnesses required by the statute, must all be attesting witnesses.

A codicil executed in the presence of two subscribing witnesses, one of whom was different from the two witnesses to the will, does not give effect to a will of real estate.—*Id.* 305. *Dunlop vs. Dunlop*

CHAPTER XI.

LOST WILL.

A will proven to have been lost or destroyed may be set up, by parol evidence. 3 *Har. & McHen.* 2. 3 *Dessasure C. R.* 458. 1 *Will. on Ex.* 78. In such cases the court will grant probat of the will as contained in the depositions. 1 *Will. on Ex.* 209.

CHAPTER XII.

WILL ERRONEOUSLY DATED.

Deakins vs. Hollis. 7 *Gill & John.* 312. The court admitted parol proof, to shew an error in the date of the will, the date being no part thereof.

CHAPTER XIII.

FOREIGN WILLS.

The mode of authenticating a foreign will is decided in the case of *Desobre vs. De Laistre, in* 2 *Har. & John.* 191. In that case, parol evidence was admitted to shew how wills are made and proved in a foreign country and a copy of a will deposited with a notary public of the island of Martinique, according to the *lex loci*, and the testimony of the testamentary executor taken under a commission issued in the cause, and accompanied with a certificate of the signature of the hand-writing of the notary public, by the colonial officer is sufficiently authenticated.

By the act of 1785, chap. 46, sec. 2, a copy of the record of any will, which the laws of the state or country, where the same may be executed, require to be recorded, under the hand of the keeper of such record or register, and the seal of the court in which the same is kept, or a copy of a will, lodged for safe keeping in any office or court agreeably to the laws of the state or country as aforesaid, and certified as aforesaid shall be good and sufficient evidence in any court of this state to prove such will. By its third section, where a will shall be executed in any other of the United States, or in a foreign country, and to give validity to which will, recording or registering is not made necessary, proof of such will, by the oath of the subscribing witnesses, or any of them to the same, taken before any officer of the state or country, when such will may be executed, authorized to administer an oath, and a certificate from the governor, chief magistrate, or notary public of the state or country, that such court or officer has power to administer such oath, and that such oath hath been duly made before such court or officer, shall be good and sufficient evidence in any court of law in this state to prove such will: And if all the witnesses to any such will shall die, before the proof of the execution of such will, then the proof of the hand-writing of the party making such will, by *a credible witness*, or to the hand-writing of the subscribing witnesses to the same, or *any* of them taken and certified as aforesaid, shall be good evidence as aforesaid.

Probat granted on a will written in a foreign language, upon a translation thereof made by a notary public. 2 *Tuck. Commentaries*, 402, *Toller*, 72.

CHAPTER XIV.

NUNCUPATIVE WILL.

No nuncupative will to be good where estate bequeathed exceeds 300 dollars, unless proved by three witnesses, &c.

1. *Be it enacted by the General Assembly of Maryland*, That no nuncupative will hereafter to be made shall be good, where the estate thereby bequeathed shall exceed the value of three hundred dollars, that is not proved by the oaths of three witnesses at the least who were present at the making thereof, nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, to bear witness that such was his will, or to that effect, nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days or more next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he or she returned to the place of his or her dwelling.—1810, *ch.* 34.

Six months after speaking pretended testamentary words, no testimony to be received unless committed to writing, &c.

2. *And be it enacted*, That six months after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will; but any soldier, being in actual military service, or any mariner or seaman, being at sea, may dispose of his movables, wages and personal estate, as he or they might have done before the passing of this act.—*Id.*

These provisions are a literal transcript from 29 Charles II., chap. 3. The words of this statute have always been construed strictly, and all of its provisions must be complied with—such a will is invalid where one of the witnesses died before probat. The statute is also strictly construed with respect to its requisition, that the testator shall bid the persons to bear witness, that such is his will, or to that effect, he must declare that the words were spoken with the intention of making his will at that time. Nuncupative wills are viewed with distrust in the ecclesiastical court, and the *making* of one requires to be proved by evidence more strict, and *stringent*, than that of a written one in every particular. This is requisite in consideration of the facilities, with which frauds in setting up nuncupative wills are obviously attended, facilities which essentially require for their suppression the utmost vigilance on part of the court. The *testamentary capacity* of the deceased, and the *animus testandi*, at the time of the alleged nuncupation, must appear, by the clearest and most indisputable testimony. *Swinburne, p.* 1. *sec.* 12, *pl.* 6—Says that a nuncupative will may be made, not only upon the proper motion of the testator but at the interrogation of another. 1 *Will. on Ex.* 60, 61, 62.

If in reducing such testamentary words to writing, a part be omitted, the residue may be good. 4 *Hen. & Mum.* 91.

A nuncupative will was admitted to probat, where the personal property of which the deceased died possessed, amounted by the inventory to $3,236. This will was proved by three witnesses, one of whom was the wife of one of the legatees who had released his interest. *Brayfield vs. Brayfield.* 3 *Har. & John.* 208.

1798, *Chap.* 101, *sub. chap.* 2, *sec.* 13.—'No nuncupative will shall be proved within fourteen days after the death of the testator, unless his widow (if any) and some of the next of kin, have been summoned to contest the same if they please.'

CHAPTER XV.

DONATIONS MORTIS CAUSA.

A death-bed disposition of property, is so called, when a person in his last sickness, apprehending his dissolution near, delivers, or causes to be delivered to another, the possession of any personal goods to keep in the case of his death. This gift, if the donor dies, needs not the assent of the executor, and cannot prevail against creditors, and is accompanied with the implied trust that the property shall revert to the donor, being only given in contemplation of death, or causa mortis. The gift, must be with the view to the donor's death, and conditioned only to take effect by the death of the donor, by the disorder existing at the time of his death, and there must be a delivery of the subject of the donation. First, the gift must be made with a view to the donor's death, that is, if a gift is not made by the donor, *in peril of death*, with relation to his death by illness affecting him at the time of the gift, it cannot be supported as a donation mortis causa. Where it appears that the donation was made whilst the donor was ill, and only a few days or weeks before his death, it will be presumed that the gift was made in contemplation of death and in the donor's last sickness. Secondly, the gift must be made to take only by the death of the donor under his then existing disorder. Although it is an essential incident to such a donation, that it be subject to the condition, that if the donor lives, that the gift shall be restored to him, yet it is not necessary that the donor should declare that the gift is by such a condition, for the law infers that the donee is to hold it, only in case the donor should die of his then illness. If however, from all the circumstances of the gift, it should appear that the gift was unconditional, it cannot be sustained as a donation mortis causa. Thirdly, there must be an *actual delivery of the thing given* to the donee, or to some person for his use; *the possession must be transferred in point of fact*. To write upon the parcels the names of the parties for whom they were intended with a request that they should be delivered as directed, is not a sufficient delivery. The donor must *part* with all dominion over the gift. Where the nature of the subject of the gift will not admit of a corporeal delivery, the delivery of the *means* of coming at the possession, or using the thing given will be sufficient. The delivery of the key of a trunk amounts to the delivery of the trunk and its contents, so of the key of a warehouse has been deemed to be a valid delivery of the goods therein, as a donation mortis causa. A bond may be the subject of a donation mortis causa, because the property is considered to be transferred by the delivery. *Snelgrove vs. Barley*, 3 *Atkins*. 214. *Ward vs. Turner*, 2 *Vesey, sen*. 442. *Blound vs. Burrow*, 1 *Bro. C. C*. 72. *Gardiner vs. Parker*, 3 *Madd*. 184. All negotiable instruments, which require nothing but delivery to pass the money to the donee, secured by them, may be the subjects of donations mortis causa. There appears to be no reason, why promissory notes payable to bearer, and bills of exchange or exchequer bills endorsed in blank should not have the same operation, for in all these cases the right to receive the money passes to the donee by the delivery. But where no property is transferred to the donee by delivery, there can be no valid donation mortis causa. Bills of exchange and promissory notes *not payable* to the bearer, are incapable of being the subject of a donation mortis causa.* The same has been decided as to a check on a banker, which is a mere order for the payment of money, and is revoked by the death of the donor before its payment. 2 *Will. on Ex.* from 449 to 502. In the case of *Pennington, adm. of Paterson vs. Gittings*, 2 *Gill & Johnson*, 208, this doctrine was reviewed and adopted, except as to bonds, being the subjects of a donation mortis causa, (which was not discussed.) The court in the above case decided that there is no difference between a gift inter vivos, and one made as donation mortis causa. In either case, *the delivery of the thing* intended to be given is essential to the perfection of the gift—and held, that a *gift* of bank stock, made by a parent to a child, by the delivery of the certificates of bank stocks, with the endorsement of his name thereon,

* This conflict of principle, between bonds and negotiable notes not payable to bearer, is to be found in numerous decisions.

was not a valid and available gift, and affirmed the decree of the chancellor, dismissing the bill, seeking a decree against the executor, compelling him to transfer the stock.

CHAPTER XVI.

LAPSED LEGACIES.

No devise, &c. to lapse by death of any devisee named in will, &c.

4. *And be it enacted*, That from and after the passage of this act, no devise, legacy or bequest, shall lapse or fail of taking effect by reason of the death of any devisee or legatee named in last will or testament, or any codicil thereto, in the life-time of the testator, but every such devise, legacy, or bequest, shall have the same effect and operation in law to transfer the right, estate, and interest, in the property mentioned in such devise or bequest, as if such devisee or legatee had survived the testator.—1810, *ch.* 34.

In *Craycroft vs. Craycroft*, 6 *Har. & John.* 54, A by his will devised his lands to his three sons, in joint tenancy—before the death of the testator, one of the devisees died. Held, that the devise did not lapse by the death of the devisee, but that the surviving sons took the whole interest by survivorship; that the act only intended to prevent the extinction of a devise or bequest, by reason of the death of the devisee or legatee, in the life-time of the testator, when in the event of such death, the devise or legacy would have, without the aid of the legislature, lapsed or failed to take effect, and the deceased have died intestate as to the property therein mentioned, and to give to such devise or bequest the legal effect and operation to pass the property in the same manner as if the devisee or legatee had survived the testator. In *Glenn vs. Belt*, in 7 *Gill & John.* 364, the court held that the legacy, where the legatee died in the life-time of the testator, goes to the *representatives* of the legatee, who would be entitled to distribution, not to his executor or administrator as assets.

CHAPTER XVII.

WILLS,

WHERE NO WORDS OF LIMITATION OR PERPETUITY ARE USED.

AN ACT respecting last wills and testaments.—1825, *ch.* 119.

Devise unless absolute exception is expressed.

Be it enacted by the General Assembly of Maryland, That in every will which may be made after the first day of April, eighteen hundred and twenty-six, whereby any lands or real property shall be devised to any person or persons, and no words of perpetuity or limitation are used in any such devise, the devisee or devisees shall take under and by virtue of such devise, the entire and absolute estate and interest of the testator or testatrix, in such lands or real property, unless it shall appear by devise over, or by words of limitation, or otherwise, that the testator or testatrix intended to devise a less estate and interest, and provided such will shall be in all respects executed and proved in the manner prescribed by law.

CHAPTER XVIII.

TESTAMENTARY PAPERS.

We have no statute of this state prescribing how wills of personal property shall be executed. The contents of this chapter are therefore not within the scope of the prospectus of this work, which professes to be restricted to the statute testamentary law. An apology for travelling beyond what was promised, may be found in the frequent recurrence of acts which require a knowledge of the general principles, and judicial decisions, which regulate the administration of justice on questions, coming within the range of this title.

'There is nothing that requires so little solemnity,' said Lord Hardwicke, on *Ross vs. Ewen, in* 3 *Atkins*, 163, 'as making a will of personal property, for there is scarcely any writing which will not be admitted as such.' It has been decided in a great variety of modern instances, that it is not necessary, that an instrument should be of a testamentary form in order to operate as a will; indeed it may be considered as a settled point, that the form of a will does not affect its title to probat, provided that it is the intention of the deceased, that it should operate after his death. Thus a deed poll or an indenture, a deed of gift, a bond, marriage settlements, letters, drafts on bankers, the assignment of a bond, by endorsement, receipts for bonds, and bills endorsed, 'for A. B. an endorsement on a note, I give this to C. D.' and promissory notes have been held, to be testamentary.* It is not necessary for the validity of a testamentary paper, that the testator should intend to perform, or be aware, that he had performed a testamentary act; for it is settled law, that if the paper contains a disposition of property to be made *after his death*, though it was meant to operate, as a settlement, or deed of gift, or a bond; and although such paper was not intended to be a testamentary paper, but an instrument of a different shape; yet if it cannot operate in the latter, it may nevertheless operate in the former character. So if a testator by a subsequent paper says, 'he has bequeathed' by a former instrument, that which he has not bequeathed, the subsequent paper would, *it seems*, be admitted to probat, as being the declaration of his will, at the time he made it, to dispose of it by the will.

But it is essentially requisite, that the instrument should be made to depend upon the *event of death to consummate it;* for where a paper directs a benefit to be conferred *inter vivos* without reference, either expressly or impliedly, to the death of the party conferring it, it cannot be established as *testamentary*.

The ecclesiastical courts do not confine the testamentary disposition to a single instrument, but they will consider several of different natures and forms, as constituting altogether the will of the deceased. 1 *Williams on executors*, 53.

This doctrine of the English ecclesiastical courts, has been adopted and sanctioned by Chancellor Kent, in the first volume of his commentaries; who says, 'marriage articles, promissory notes, assignments of bond, letters and so forth, though not intended as wills, yet if they cannot operate in any other way, may be admitted to probat as a will of personal property; provided it be clear, that it should operate after the death of the maker or writer.'

In the case of *Wagner vs. McDonald*, 2 *Har. & John.* 346, a paper was exhibited for probat, as the last will of C. W. proved to have been signed by him, when he was about to leave the state. It was written somewhat in the form of a letter, and stated, 'If I should not come to you again, my son shall pay,' and so forth. Evidence was given that the writer went to Ken-

* Where one enclosed securities for debt in an envelope, and endorsed thereon 'for R. G.' and other like securities in another envelope, and endorsed thereon 'for the heirs of C. D.' and such securities were found in the possession of the deceased, never having been out of his possession, and without mentioning the subject to any person, it was held that such endorsement was not testamentary. *Plumstead's case*. 4 *Ser.* 545.

tucky, that he returned, lived for several weeks thereafter; *held*, that inasmuch as the writer had returned before his death, that the paper could not be admitted to probat as his last will.

The doctrine of the court in this case, is sustained by Lord Hardwicke, in the case of *Parsons vs. Lenoe*, 1 *Ves. San.* 190. The testamentary paper in that case was this—'If I die before my return from Ireland,' I devise thus. The testator returned, lived some years after, and then died. Lord Hardwicke held the will to be contingent, depending upon the event of the testator's return—that as he had returned, the will was void. The courts are cautious how they construe conditions of this sort—for where a testator by letter, gave certain testamentary directions, 'in case I should die on my travels,' although he returned, and lived many years, yet, as by subsequent acts, he recognized the paper containing these directions, two years before his death, the court held, that his return was not such a defeasance as to invalidate the disposition of his property contained in his letter, 1 *Will. on Ex.* 92, where the authorities are collected. In a very recent decision (1832) of Sir John Nichol, reported in the fourth volume of *Hag. Ecc. Rep.* 178, *Page vs. Collingwood*, such a contingent paper was admitted to probat without any subsequent recognition of it by the testator—in that case, the testamentary paper was thus, 'March 5, 1814, morning, near one; all men are mortal, and no man knows how soon his life may be required of him; lest I should die before the next sun, I make this my last will and testament.' The testator died in January, 1832.

It appeared in evidence, that the testator on the day before his death, told his daughter that he had made no will—the will was found in the drawer in which the testator kept his cash. The admission of the will to probat was resisted on the ground that it was contingent and conditional. Sir John Nichol admitted it to probat.

In the case of *Hattal vs. Hattal*, 4 *Hag. Ecc. Rep.* 212, in (1832.) The testatrix lived with her brother; in the autumn of 1828, she went to Falmouth, while there, she made an entry in an account book, containing a full disposition of her property, signed, and dated it on 30th of May, 1829. In June she returned to her brother's, and died in December, 1829. Just above the deceased's signature, were the words, 'I intend this a sketch of my will which I intend making on my return home.' She preserved the account book, and made business entries therein. Sir John Nichol admitted the entry to probat as testamentary.

T. being about to sail to the West Indies, where he afterwards died, addressed a letter to L. M. containing the following clause, 'a thousand accidents might occur, which might deprive my sisters of that protection which it would be my study to afford; in that event, I must beg you that you will put them in possession of two-thirds of what I am worth; appropriating one-third to Mrs. C. and her child, in any manner that may appear most appropriate. *Held*, that it is a valid will. *Morrell vs. Dickey*, 1 *J. C. R.* 153.

The signature, or the seal of the testator is not necessary for the validity of a will of personal property, whether, the instrument be in the handwriting of the testator, or in that of another person. 1 *Williams on Ex.* 49.

Theodosia Key, requested her son-in-law, Edmond Key, to draw her will, which at her desire, and according to her instruction, he accordingly did, and wrote the same altogether in his own hand, and enclosed the same, directed to the said Theodosia, who received and kept the same by her until her death—the same being found among her papers safely locked up; and at many different times she declared, she had made her will, and frequently produced the said will, and also related in what manner and to whom she had given her estate. The will as exhibited was not signed by the testatrix, not attested by any witnesses. The day and month as well as the name of the executor was left blank.) The commissary-general and judge for probat of wills (Walter Dulany) decreed in favour of the paper, and admitted it to probat as the will of Theodosia Key. An appeal was had to the court of delegates, the decree was affirmed there. *The visitors of the free school in St. Mary's county vs. Norman Bruce.* 1 *Har. & McHen.* 509.

James Brown, concludes a codicil to his will, thus, 'In testimony that this is my codicil to my last will and testament, I have hereunto set my hand

and seal, this —— day of —— 1820,' and sets forth, the form of attestation in the usual manner. The codicil was in the hand-writing of the deceased, and the will and codicil were found together, contained within the same envelope. It appeared that the deceased was a man of intelligence and particularly attentive to business.

Chief Justice Chase, in delivering the opinion of the court, says, 'I am of opinion that the codicil, being in the hand-writing of the deceased, and being found with the will, and enclosed together under the same cover, and reciting the alterations he intended to make in his will as to his personal estate, was a good and valid testamentary disposition of his personal estate, without signing his name, or the attestation of witnesses; and the omitting to do that which the law does not require to give validity to a will of personal estate, cannot change or diminish the legal efficacy of the writing, or be construed into a relinquishment of his intention, and convert it into a mere project, or plan of a will, and thereby defeat the intention of the testator, indicated in the plainest manner in a writing professing to be a codicil to his will, and having every essential the law renders necessary to give validity as a testamentary disposition of personal property. The codicil was a valid disposition, as soon as it was written, folded up and put in a place of security. *Brown vs. Tilden.* 3 *Har. & John.* 371.

A testamentary paper found in an iron chest among valuable papers, without signature, and having an attestation clause, without witnesses, written by the deceased, with his name in the beginning thereof in a fair hand-writing on conveyancing paper, with a seal attached thereto, evincing much foresight and deliberation in its provisions, and disposing of real and personal property to a large amount, is a good and valid will according to the *common law.* 4 *Wen. New York Rep.* 168, *Le Roy vs. public adm. of city of N. Y.*

If there be an attestation clause at the foot of a testamentary paper, the natural inference, is that the testator meant to execute it in the presence of witnesses, and that it was incomplete in his apprehension of it till that operation was performed; and consequently the presumption of law is against a testamentary paper, with an attestation clause not subscribed by witnesses. This presumption is held to be strengthened, when the instrument purports to dispose not only of personal, but also of real property; as to which it must be clearly inefficient. It is true that in *Cabbold vs. Brass,* the court of delegates was of opinion, that a will of both real and personal property, with an attestation clause unexecuted by witnesses, was *reddendo singula singulis,* a perfect disposition of personal property, and therefore a good will, but this decision may be considered as overruled, by those of *Matthews vs. Warner.* 4 *Vesey,* 186. 5 *Vesey,* 23, *and Walker vs. Walker.* 1 *Merrer,* 503. The presumption thus raised is slight, and may be repelled by slight circumstances; yet slight as it is, it must be rebutted by some extensive evidence, either that the testator was prevented from finishing the instrument, by the act of God, or that he intended it to operate in its present form. In the case of *Buckle vs. Buckle.* 3 *Phillimore,* 323; the fact of the testamentary paper being sealed up at the death of the testator, with an appearance that he did not intend to open it again, was held sufficient to rebut the presumption, by shewing that the testator intended it to operate in its present form. So a recognition of it by the testator as a will, will suffice. 1 *Will. on Ex. page* 48.

In the case of *Tilghman and others vs. Steuart and others, in* 4 *Har. & John.* 156, a paper purporting to be the last will and testament of David Steuart, wholly in his own hand-writing, and having his name written in the beginning, devising and bequeathing both real and personal estate to his brothers, nephews and nieces, &c.; leaving blanks for their names, and appointing by name his two brothers and nephew, his executors, leaving also the day, month and year blank, with a formal seal affixed, and having the form of an attestation used to wills devising real estate, with three crosses opposite to where witnesses are accustomed to sign their names, was found after the death of the said Steuart, in an envelope of white paper, having thereon, written at the top, in the hand-writing of the said Steuart, words corresponding with the concluding words of the will, and which appeared to

be a small part of the draft from which the said will was copied, deposited at the bottom of a bundle of certificates of bank stock to a large amount, in a locked trunk, a place of great security, and containing a considerable sum of money, and many valuable papers, and none but papers of importance. It was proved that the said Steuart was a man of intelligence, and a man well acquainted with the manner and form of making wills, and also well acquainted with the names of his brothers and sisters, nieces and nephews, and all his family and connections. That in recent conversations with his intimate acquaintances, he said he was prepared with a will, and that he made it a point always to have one by him Bank stock had been purchased for him by his directions, which had not been transferred to him, and which was not mentioned in his will, and there was not any general residuary clause therein, by which that stock would pass. The orphans court of Anne Arundel county, decreed that the paper be admitted to probat as the last will and testament of David Steuart; on appeal the decree was reversed. Judges Martin, Nicholson, and Buchanan for the reversal, chief judge Johnson, and chief judge Chase for affirming the opinion below.

In the preceding case of Theodosia Key's will, we have seen that the instrument was admitted to probat, though in the hand-writing of a third person, and never signed by her. So, if a person gives instructions, and dies before the instrument can be executed formally, the instructions, though never reduced into writing in his presence, nor ever read over to him, will operate as fully as a will itself. It is, however, essential that the instructions be reduced into writing in the life-time of the deceased—nor is it necessary that the instructions should be given by the deceased to the drawer, they may be communicated through a third person, although the court pronouncing on such a paper, ought to be very guarded.

The doctrine that instructions may be communicated to the drawer of the will, through the intervention of a third person, is sustained by the judgment of the court of appeals, in the case of *Barnes vs. Crouch*, given at the June term, 1834. The case has not been reported. It is now given to the profession from the inspection of the record by the compiler.

Barnes vs. Crouch, appeal from the orphans court of Baltimore county. The paper exhibited for probat as the testament of Thomas L. Davis, was this—'I, Thomas L Davis, being very sick in body, but of sound and disposing mind, memory and understanding, do hereby publish and declare this as my last will and testament, in manner and form following, that is to say, first, and principally, I commit my soul to God, and my body to the earth, to be decently buried, at the discretion of my executor, *hereinafter named*, and after my funeral expenses are paid, I devise and bequeath as follows. I give and bequeath all my estate, both real and personal, and all cash or whatever is now due me, of whatever kind or nature, to my brother, John Davis, and my sister, Margaret Crouch, to them and their heirs, equally to be divided between them, share and share alike.'

The will was offered for probat by David Crouch, the husband of the legatee.

Charles Kernan testified, that in the month of September, 1832, he was requested by George Leffler, to go with him to draw the will of Thomas L. Davis, that he went to the house where Davis lived, that Mr. Crouch, and he thinks his wife, and another person stated to him the manner in which Davis wanted to dispose of his effects, which was to leave his property to Mrs. Crouch, his sister, and John Davis, his brother, equally to be divided between them, and, that according to these instructions he drew the paper exhibited, that after the deponent had drawn the said paper, he went up stairs to see the sick person, which he understood to be Davis, and he then found him to be in a situation not capable of making a will, that he was speechless, and dying.

George Leffler testified, that he was sent for by Thomas L. Davis, and heard him say, that he wished to see his sister, and that he wanted his money to be equally divided between his brother and sister, mentioned in the paper, that Mrs. Crouch was sent for and came into the room, and that Catharine Hammond was in the room, and a conversation was then had between Catharine Hammond and Thomas L. Davis, concerning his will, and that Davis again said, that he wanted his money to be divided between

his brother, John Davis, and his sister, Mrs. Crouch. After these remarks, the witness left the room; he was in a short time again sent for by Thomas L. Davis; he was requested to go for a Mr. Mills, and to tell him to procure a hack, and procure a squire. Mr. Mills told him to procure a squire, he called on Mr. Kernan, and told him he wanted him to draw the will of Mr. Thomas L. Davis. The deponent stood by Mr. Kernan when he was drawing the will, he asked him how Davis wanted to leave his property, and in what it consisted, he answered, it was in money, and he believed that Davis wished it to go between his brother and his sister Margaret; that deponent appealed to David Crouch as to whether the instructions which he gave to Kernan were right, but Crouch refused to say any thing about it, the deponent then called Mrs. Crouch, who immediately came down, the deponent then repeated what he had told Mr. Kernan; Mrs. Crouch then told Kernan that the instructions which the deponent had given him were right. The deponent did not receive *the instructions* from Thomas L. Davis to have the will drawn, but he had given instructions, in consequence of what Thomas L. Davis had stated in the presence of the deponent upon his first interview with Thomas L. Davis, how he wished his property to go; that after the will was written, he went up stairs with Kernan; the will was not read, Davis was so ill, that it was thought unnecessary to read it. He believes that Davis was in his senses at the time he went up stairs; doctor Roberts thought Davis capable of making a will.

Catharine Hammond says, she was standing by the bed-side of Davis on the day on which Davis died, when his sister, Mrs. Crouch, asked him if he wished to see a Mr. Mills, his former guardian, he answered yes, and requested his sister to send for him, and to tell him to bring a squire with him. His sister asked him what he wished to see a squire for, he said, to settle his affairs; his sister then asked him in what manner he wished it settled, he replied, he wished half of it for her, and half of it for his brother.

Ann Leffler sustains the testimony of Catharine Hammond, as to the disposition of Davis to send for Mills, and to bring with him some person to prepare his will, and the manner in which he wished to bequeath his property. Will admitted to probat, and upon appeal, confirmed.

The testator dying in the act of dictating his instructions to his solicitor, in the presence of a third person, and having proceeded as far as the clause appointing an executor, was attacked with the paroxysm which terminated his life, immediately after his death, the third person, on hearing the instructions read over, observed to the solicitor that he omitted a legacy, which the deceased had directed, which the solicitor immediately recollecting, added the legacy. Sir John Nicholl, said he had no doubt in pronouncing the instructions to be the will of the deceased, so far as (it went to) the appointment of the executor; but as the last clause was not committed to writing during the life of the deceased, it could not be established and must be struck out. However, a mere paper of instruction, though in the party's own hand-writing and signed, cannot be sustained as testamentary, if there was no sudden death, or act of God, to prevent the regular execution of the will of the deceased. 1 *Will. on Ex.* 50.

CHAPTER XIX.

IMPLIED REVOCATIONS.

With respect to revocations of wills, they are implied by operations of law or express according to the directions of this act, and the act of 1810, ch. 34, sec. 3. Implied revocations have been decided upon nice and artificial reasons, from an inclination which the law always shews to favour the heir. The ground of the decisions have not always been uniform; for some of them have been determined upon the presumed intent of the testator to revoke his will; and others upon the ground of its being a positive rule of law, making the act done a revocation without any regard to the intent. It seems clear that the estate devised must remain in the same condition until the testator's death, for any the least new modelling of the estate, after the will, is an actual

revocation. Whenever the devisor puts the whole interest of the lands devised out of himself, by any conveyance whatsoever, after making his will, it is a revocation, although he takes the same estate back again. 1 *Saunders, Duppa vs. Mayo*, 277, *note* 4. Where all the cases are collected and reviewed. See also 1 *Williams on Ex.* 101.

A conveyance of land by the testator, after the execution of a will, for the payment of debts is a revocation only *pro tanto*. *Livingston vs. Livingston*, 3 *John. Ch Rep.* 148.

Where a contract is made by the testator for the sale of lands devised, which is rescinded by mutual agreement, and the testator is thus restored to his former estate and title, the devise is nevertheless revoked. *Walton vs. Walton*, 7 *John. Chan. Rep.* 258.

It seems that if the testator conveys the estate devised, though he takes it back by the same instrument, or otherwise, it is a revocation at law and equity, *though* he did *not intend* to *revoke it*.—*Id.*

A conveyance inoperative, for want of completion, or by the incapacity of the grantee, may amount to a revocation, if it shows the *intention* of the testator to revoke his will.—*Id.*

A devise once revoked expressly or by implication, cannot be restored without a republication of the will.—*Id.*

In the preceding case of *Massey vs. Massey*, 4 *Harris & John.* 142, the court decided that the birth of children, after the execution of a will, does not operate as a revocation of the will.

Subsequent marriage and birth of a child are an implied revocation of a will, made before marriage, either of personal or real property. *Brush vs. Wilkins*, 4 *John. Chan. Rep.* 506. But such presumptive revocation may be rebutted by circumstances.—*Id.*

The English rule is, if the will contains an entire disposition of the *whole* estate, to the prejudice of the wife and children, the will made before marriage is revoked. 2 *Black. Com.*

In the case of *Lord Illchester*, 7 *Vesey*, 348, a disposition was made by will in favour of children by a former marriage. The testator afterwards married and had children by that marriage, that was held not to revoke the will, upon the ground that the second children were provided for by the second marriage settlement. Lord Mansfield in the case of *Brady vs. Cubitt*, in *Doug.* 40, says, 'upon my recollection, there is no case in which marriage and the birth of a child have been deemed to raise an implied revocation, where there has not been a disposition of the whole estate.

CHAPTER XX.

REVOCATIONS BY CANCELLATION OR OBLITERATION.

Cancelling and obliterating are considered equivocal acts, which in order to operate as a revocation, must be done with an intention to revoke. The presumption of the law is, that such acts are done *animo revocandi*—but this presumption may be repelled by showing that the *animus* did not exist when the act was done. As a man having by him two wills of different date, should direct the former to be cancelled, and through mistake the person should cancel the latter, such an act would not be a revocation of the latter will. This principle that the effect of obliteration and cancellation depends upon the intention with which it is done, has produced the doctrine of dependent relative revocations, in which the act of cancelling, &c. being done with reference to another act meant to be an effectual disposition, will be a revocation or not, according as the relative act is efficacious or not.

Thus in *Onions vs. Tyrer*, 2 *Ves.* 742. *Duppa vs. Mayo*, 1 *Saun. Rep.* 279, a man made a second will, which was not good as to the real estate, not being attested according to the statute of frauds; after executing the second will, he cancelled the first, by tearing off the seal; the question was whether the cancelling of the former was a revocation thereof, within the statute of frauds and perjuries, and it was held that it was not, because that was no subsisting independent act, but done to accompany or by way of confirmation of the second will; it was done from a conviction that the second will had

actually revoked the first, which induced the testator to tear that as of no use, therefore, as the first was not effectually revoked by the second, neither ought the act of tearing the first to revoke it, for though a man by the statute of frauds, may as effectually destroy his will by tearing or cancelling it, as by making a second will, yet when he intended to revoke the first will, by the second, and it was insufficient for that purpose, and as the tearing and cancelling the first was only in consequence of his opinion that he thereby made good the second will, the tearing and cancelling should not destroy the first, but it ought to be considered as still subsisting and unrevoked. This doctrine is recognized by Lord Mansfield, in the case of *Bertingshaw and Gilbert, Cow.* 52. *Lord Ellingborough in Perrot vs. Perrot,* 11 *East,* 440; *by Sir John Nicholl in Lord John Thynes vs Stanhope,* 1 *Add.* 53. So in the case of *Hyde vs. Hyde,* 1 *Eq. Ca. Abr.* 409, where the testator having given instructions for some immaterial alterations in a properly executed will, read over a draught of a new will made according to his instructions, and having signed such draught, tore the seals from his old will, under the impression that the new will was completely executed so as to pass lands; this was held to be done *sine animo cancellandi,* and therefore to be no revocation of the original will.

In the case of the goods of *Applebee,* 1 *Hagg. E. Re.* an executor, having in pencil, altered a will (by the direction of the testator, who approved it, when so altered) and then cancelled it, only that another might be drawn up, the preparation of which was prevented by the death of the testator, Sir John Nicholl, held that such cancellation, being preparatory to the deceased making a new will, and conditional only, was not a revocation as to partial cancelling or obliteration. If a testator tear off, or efface his seal and signature at the end of a will, the court will infer an intention to revoke his whole will, this being the ordinary mode of performing that operation. If the testator on the other hand, obliterates a particular clause or part, this on the same principle only operates as a revocation *pro tanto,* or of that particular clause or part. With respect to what shall amount to a cancellation or obliteration, sufficient to operate as a revocation, the principle appears to be, that if the intention to revoke is apparent, an act of cancellation or destruction shall carry such intention into effect, although literally not an effectual destruction or cancellation, provided that the testator had completed all he designed to do for that purpose. A will was found in the repositories of the deceased, and it appeared that some one had carefully cut out, apparently with scissors, the whole of the instrument from its marginal frame; the attestation clause was carefully cut through, but no part of the writing, and it was held, that the court was bound to construe the act, as one done by the testatrix, for the purpose of cancelling the validity of the instrument, and consequently, that it was thereby revoked. 1 *Wil. on Ex.* 73. In the case of *Bibb vs. Thomas,* 2 *Black. Rep.* 1023, it appeared in evidence that the testator, ordered his will which he had previously duly executed, to be brought to him, after opening it and looking at it, he gave it 'a rip' with his hands so as almost to tear off a bit, then rumpled it together, threw it on the fire, but it fell off; that it must have been burnt, had not a person present, taken it up and put it in her pocket; that the testator did not see her take it up, but had some suspicions that she had done so, and he asked her what she was about, to which she made little or no answer; that the testator said several times after, that this was not his will, nor should not be his will; that afterwards upon repeated inquiries, she told him that she had destroyed it; though it in fact was never destroyed; the testator died without making another will. The jury with the concurrence of the judge, thought this a sufficient revocation of the will, and upon a motion for a new trial, lord chief justice De Grey, observing that this case fell within two of the specific acts described by the statute of frauds; it was both a burning and tearing; and that throwing it into the fire, with intent to burn, although it was only slightly singed and fell off, was a sufficient burning within the statute. But if the act of destruction be inchoate and imperfect, it will not amount to either to a total or partial revocation; as where the testator, being moved by a sudden impulse of passion against one of the devisees under his will, conceived the intention of cancelling it, and accomplishing that object by tearing it. Having torn it twice through, his arms were arrested by a

bystander, and his anger mitigated by the submission of the party who had provoked him, he then proceeded no further, and after having fitted the pieces together, and found that no material word had been obliterated, he said, 'it is a good job, that it is no worse.' The court of King's bench agreed with the jury that there was no revocation of the will. *Doe vs. Perkes*, 3 *Bald. & An.* 489. Alterations in ink, in the margin and body of a duplicate will, carefully made and conformable to long entertained and recently expressed intentions, were held to contain the final intentions of the testator, and as such admitted to probat. A codicil is dependant *prima facie* on the will, and the cancellation of the will, is a cancellation of the codicil. It is a question, however of intention, consequently the legal presumption may be repelled, namely by shewing that the testator intended that the codicil should operate, notwithstanding the cancellation of the will. If a will be executed in duplicate, and the testator, keeps one part by him, and deposites the other with a third person, and the testator cancels or destroys the part in his own custody, it is a revocation of both. The presumption of law, liable to be rebutted by proof, is that the cancelling the one in his possession, was done *animo revocandi* as to both. The same presumption holds, though in a much weaker degree, where both instruments are in the testator's possession. Where the testator retaining both duplicates, alters the one, and then destroys that which he has altered, then the same presumption holds, though weaker still. In the case of a draught which the testator signs, and afterwards executes a will from it, if he should afterwards cancel a will *animo revocandi*, the draught would also be thereby revoked. If a testament was in the custody of a testator, and upon his death it is found among his depositories cancelled or defaced, it is presumed, that the testator himself did the act, and that he did it *animo revocandi*, so when a testator had a will in his own custody, and that will cannot be found after his death, the presumption is that he destroyed it himself; and this presumption, holds with respect to duplicate wills; hence if a will executed in duplicate, and the testator has the custody of one part, and it cannot be found after his death, the presumption of the law is, that he destroyed it *animo revocandi*, and both parts are considered as consequently revoked, unless such presumption be rebutted.

Where a will duly executed, and in the custody of the testator, for five years afterwards, and within a few months previous to his decease, could not be found after his death, it was held that the legal presumption was, that such will had been destroyed by the testator *animo revocandi*, although it appeared that a fortnight before his death, that the testator had requested a scrivener, to draw a codicil to his will, which was not done, nor was the will at that time produced to the scrivener. 6 *Wen.* 173.

There can be no doubt if a will duly executed is destroyed without the authority of the testator, it may be established upon satisfactory proof being given of its having been so destroyed, and also of its contents, as where after the death of the testator, his will and codicil were wrongfully torn by his eldest son, the court, by means of some pieces which were saved, and oral testimony, having arrived at the substance of the will. 1 *Will. on Ex.* 74, 75, 76, and the cases there cited.

If a will be wholly or partially cancelled or destroyed by the testator, while of unsound mind, it will be admitted to probat in its integral shape, that being ascertainable. 1 *Will. on Ex.* 78.

The cancelling of a will by a testator, is an equivocal act, and does not amount to a revocation unless done *animo revocandi*. Where it is a dependant relative act, done with reference to another will, which the testator thinks he has legally executed, it may be a revocation or not, as such other will is valid or not; as where the testator having executed a will causes another to be prepared, and cancels the first, only because he supposes the second to be duly executed; the cancelling of the first will, will not operate as a revocation of it if the second proves to have been improperly executed. But where the cancelling is deliberately done, without accident or mistake, it will operate as a revocation, notwithstanding the party may have at the time intended to make another will, and may have omitted to do so. *Semmes vs. Semmes*, 7 *Har. & John.* 388.

The testator devises to his eldest daughter three hundred acres of land, being a part of his Newton tract; he devises to his two youngest, all his land except the three hundred acres so devised to his eldest daughter. This will, after the testator's death, was found where it had been carefully put away by the testator, the clause containing the devise of the three hundred acres to his eldest daughter, had been obliterated, by drawing the pen over every word thereof, but it was distinctly legible; and in the clause devising all his lands to his two youngest daughters, except the three hundred acres, the exception was in the same manner obliterated, but likewise legible. The court held, that inasmuch as the obliteration of the exception in the latter clause did not vest the three hundred acres in the youngest daughters, as the will was not republished after the obliteration, that the devise to the eldest daughter was not revoked by the obliteration of it. *Pringle vs. McPherson*, 2 *Dessa.* 528.

CHAPTER XXI.

WILLS,

REVOCATION BY EXPRESS REVOCATION.

No will in writing to be repealed or altered except in life-time of testator, committed to writing, &c.

3. *And be it enacted*, That no will in writing concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise or bequest therein, be altered or changed by word of mouth only, except the same be in the life-time of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least.—1810, *ch.* 34.

This section is a literal transcript from the 22d section of the statute of frauds. A will of personality, however, solemnly and formally made, may be totally or partially revoked by another subsequent will or codicil, or other instrument, however informal with respect to language or execution, provided it can be considered a testamentary paper, according to the rules of the ecclesiastical court; nor is it necessary, in order to produce such effect, that in the latter testamentary paper, there should be any mention of revoking the former. 1 *Will on Ex.* 78.

It was at one time objected, that although instructions neither reduced into writing in the presence of the testator, nor read over to him, may operate as a will of personal property, so that they be put into writing in the life-time of the testator; yet, that such a paper cannot revoke a prior one without violating the restrictions of the preceding section. But it is now held that the section does not prevent a revocation by such means. The case of *Sellars vs. Garnet*, in the Prerogative court, October, 1748, is full to this point; for there an executed will was held to be revoked by a will made while the testator was alive, but he died before it was brought to him, and the contents thereof was proved by witnesses, who heard him give instructions, agreeable to what was written down. It was insisted that this parol evidence could not be received; that it was to revoke a written will by parol only, contrary to the statute; but both doctor Bettesworth, in the Prerogative, and the delegates who affirmed this sentence in 1751, were of opinion that it was a will in writing, that the parol proof of the instructions ought to be received, and that it was not a case within the statute of frauds.

This case is cited in 1 *Phill. Ec. Rep.* 431, in the case of *Hilyar vs. Hilyar*—adopted by 1 *Will. on Ex.* 78, and acquiesced in in very many cases in the ecclesiastical reports.

CHAPTER XXII.

REVOCATION BY A SUBSEQUENT TESTAMENTARY DISPOSITION.

'Concerning the making of a latter testament,' says Swinburne, 'so large and ample is the liberty of making testaments, that a man may, as oft as he will, make a new testament even until his last breath; neither is there any cautel under the sun to prevent this liberty: but no man can die with two testaments, and therefore the last and newest is of force: so that if there were a thousand testaments, the last of all is the best of all, and maketh void the former.'

It is indeed a necessary consequence of the ambulatory nature of a will, that the *last* testamentary disposition of property by a testator shall be operative, to the exclusion of any previous contrary or inconsistent one.

But the mere fact of making a subsequent will does not work a total revocation of a prior one, unless the latter expressly revoke the former, or the two be incapable of standing together: for though it be a maxim, as Swinburne says above, that 'no man can die with two testaments,' yet any number of instruments, whatever be their relative date, or in whatever form they may be, (so as they be all clearly testamentary papers) may be admitted to probat as together containing the last will of the deceased. And if a subsequent testamentary paper be partially inconsistent with one of an earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent.

Upon the same principle it has been decided, that a subsequent will is no revocation, unless the contents of it are known: and it is not to be presumed from the mere circumstance of another will having been made, that it revoked the former. As where it was found by a special verdict that the testator, after the making of a former will, made *another* will in writing; but what the contents and purport were, the jury did not know: The second will was holden not be a revocation of the first: for the other will might concern other lands, or no lands at all, or be a confirmation of the former. And though a will be expressly found to be different from a former, yet if it be declared that it is not known in what the difference consisted, it will be no revocation in law thereof. Thus where it was found by a special verdict that the testator did make and duly publish *another* will in writing in the presence of three subscribing witnesses who duly attested the same; that the disposition made by the testator by the second will *was different* from the disposition in the former will, but in what particular was unknown to the jury; but they did not find that the testator cancelled the second will, or that the devisee under the first will destroyed the same, but what was become of the second will the jury could not tell: It was adjudged in the King's Bench on Error, reversing the judgment of C. B. to the contrary, that the second will was no revocation of the first: and the judgment of the court of King's Bench was affirmed in the House of Lords.

If two inconsistent wills be found of the same date, or without any date, and no evidence can be adduced establishing the posteriority of the execution of either, both are necessarily void, and the deceased must be considered intestate: but in every case the courts will struggle to reconcile them, if possible, and collect some consistent disposition from the whole.

It may sometimes become a question, in a case where there are several codicils, or other testamentary papers of different dates, whether the dispositions of the latter are to be considered as additional and cumulative to those of the prior, or as a substitute for, and consequently revocatory of them. As if a testator, by a codicil to his will, should direct a certain mode of making a provision for his wife, and by another subsequent codicil, should also direct a provision for her in another mode; on the face of these instruments it might be doubtful, whether by the latter codicil he intended to increase the provision made by the former, or to revoke it by substituting that contained in the latter. In such cases, the Ecclesiastical court will admit parol evidence, in order to investigate the *animus* with which the act was done; and if upon such evidence it should appear, that the latter codicil, although containing no revocatory words, was intended by the testator as a substitute for the former,

it shall be thereby revoked, though it remain uncancelled. However, the general principle is, that bequests are *prima facie*, to be taken cumulatively, when they are on separate papers, unless they are revocatory of each other.

A will of personalty may also be partially revoked, in some instances, by a subsequent unfinished will, which the testator has been prevented by the act of God from completing. The rule is, that where there is a regular will, and another paper begun as a new will, which the testator has been prevented, by the act of God, from finishing, the two papers may be taken together as the will of the deceased, and operation *pro tanto* be given to the latter paper, provided the proof of final intention be clear; but it will not wholly revoke the former paper. Thus in *Goldwyn & Aspenwall vs. Coppell*, there was a will regularly executed in Jamaica: The deceased gave instructions for an entire new will; before he disposed of the residue he became incapable. The court pronounced for the two papers, as containing together the will. This has been the constant doctrine of the Ecclesiastical court: where instructions are finished, they are not revoked by an unfinished paper, except as far as it goes; the law presumes that the testator would have adhered to the remainder.

In these cases, it may be observed, that the unfinished instrument is not looked upon in the Ecclesiastical court as a codicil, to be taken in addition to the will, but revocative as far as it goes, and to be taken in conjunction with the will. 'If this principle,' said Sir John Nichol, in *Ingram vs. Strong*, 'was rightly understood in other courts, there would seldom be much question about cumulative legacies; for where a paper is codicillary, and two legacies are given to the same person, they are cumulative: where instructions are pronounced for, as *containing together* a will, that is, where there is a complete will, and an instrument intended as the inception of a new will, but not completed, the latter legacy supersedes and revokes the former, and is substituted in the place of it.'

It has already appeared that a cancellation of a will, under an erroneous assumption of facts, may not operate as a revocation: Upon the same principle, if a man, by a subsequent will or codicil, make a disposition different from a former one, under a false impression, the *impulse of which is the foundation of his wish to change his former intent*, such an act will be considered only as effecting a contingent presumptive revocation, depending on the existence or non-existence of that fact. As if one having previously devised to A, afterwards by another will, without destroying the first, or by codicil, devise to B, stating her to be his wife, so that it may be understood that he intended her to be benefitted in that character only, and it turn out that she was married before, and had a husband living, neither of which facts were in the devisor's knowledge; such devise or codicil will not operate as a revocation of the former will, because it depends on a contingency which fails. It has been said, that care must be taken to distinguish between cases, where the testator acts under a false impression, originating from a deceit practised upon him, and those where, although the reason which he gives for his subsequent devise is false, yet no deceit is practised on him. But there seem to be no grounds for any such distinction. Thus, where a testator gave legacies to the grandchildren of his sister, and afterwards by a codicil, revoked the legacies, giving as a reason, that the legatees were dead; upon its being proved that the fact of their death was not true, Lord Loughborough held, that the legacies were not revoked, on the ground that the cause of the revocation was false; and said, whether it was by misinformation or mistake, was perfectly indifferent. So in a late case in the prerogative court, the deceased supposing his will, appointing his wife sole executrix and universal legatee for life, to be lost, made in Peru, a nuncupative will (not in conformity with the statute of frauds) with a general revocatory clause, and appointing two executors, and his wife universal legatee, absolutely. The executors renounced, and she took probat of that will in Peru. The former will being found, (of which fact he was ignorant at the time of his death,) probat thereof, at the wife's prayer, was granted to her; and Sir John Nicholl observed, that it was unnecessary to decide the question (about which there might be some doubt) whether the statute of frauds would apply to the nuncupative will made in Peru: because it appeared that the deceased did not intend to revoke the former will; but supposing it to be lost, and being unwilling to die intestate, he made the nuncupative will.

But there does seem to be a distinction between cases, where the testator refers to a fact as having actually happened, and where he merely expresses his doubt, supposition, or advice of the fact.

It has long been a *vexata questio*, whether the principle of law is, that, on the revocation of a latter will, a former uncancelled will shall revive or not. In the common law courts, it has certainly been laid down as an absolute proposition, excluding all question of intention, that the former will shall revive. Thus, in *Goodright vs. Glazier*,[1] the former will (being a will of lands) was made in 1757; the second in 1763. The former was never cancelled; the second was cancelled by the testator himself. Both wills were in the testator's custody at the time of his death: the second cancelled, the first, uncancelled. It was held, that the first will was valid, because the second, being cancelled before the testator's death, had no operation whatever, and therefore, the first stood unrevoked. So in *Harwood vs. Goodright*, Lord Mansfield said, that it had been settled, that 'if a man by a second will, even revoke a former, yet if he keep the first will undestroyed, and afterwards destroy the second, the first will is revived;' and in giving his judgment in the same case, his Lordship again laid down that 'if a testator makes one will and does not destroy it, though he makes another at any time, virtually or expressly revoking the former; if he afterwards destroy the revocation, the first will is still in force, and good.' However, when in the late case of *Moore vs. Moore*, these authorities were cited before the Delegates, Lord Tenterden, (then Mr. Justice Abbott,) appeared to doubt whether it ought to be laid down as a decided principle of law without limitation, that the cancellation of the second will revives the first; and Mr. Baron Richards observed, that he thought he might venture to say, it had not been universally so considered.

In the Ecclesiastical courts, it seems that a different doctrine from that laid down in the common law courts had prevailed; for it has been decided in a variety of cases, that the presumption is *against* the revival of the prior will, and that the *onus* is thrown on the party setting it up, to rebut that presumption.

But the judgment of the delegates in the above cited case of *Moore vs. Moore*, where the point was very ably argued and fully considered, has been understood to establish, that it is to be regarded as a question of intention, to be collected from all the circumstances of the case, and that the legal presumption is neither adverse to, nor in favour of, the revival of a former uncancelled, upon the cancellation of a latter, revocatory will. Having furnished this principle, the law withdraws altogether; and leaves the question, as one of intention purely, and open to a decision, either way, *solely* according to facts and circumstances.* 1 *Will. on Ex.* 78—88.

* Where a former will is attempted to be set up, from the cancelling of a latter will, all facts evincing the intention of the party therein shall be received in evidence. *Boudinot vs. Bradford*, 2 *Yeates*, 170. And *per curiam*. 'Here more than mere declarations are attempted to be proved; and we are bound to hear the facts from the witnesses. How otherwise can the *quo animo* of the testator in the act of cancelling be collected? All presumptive revocations may be encountered by evidence, and rebutted by other proof. The act of cancelling, is in itself equivocal. Suppose a will cancelled by the testator when no one was present; shall not his subsequent declarations that he did so, for the purpose of dying intestate, be given in evidence, though he might have left a prior written will, which had probably escaped his recollection? Or, suppose a friend to whom a will was entrusted, should basely destroy it; or, that it was accidentally eaten by rats or other vermin; shall such destruction of the latter will necessarily and of course set up a former will, in manifest contradiction to the declared sense of the testator? A variety of cases may certainly be put, which clearly show, that mere cancelling of a second will by mistake of the testator; design of a third person, or accident, does not of itself establish a prior will. The issue of *revocavit vel non*, like that of *devisavit vel non*, depends on the intention.' And in the case of *Lawson vs. Morrison*, 2 *Dallas*, 289, it was said by M'Kean, C. J. in the High Court of Errors and Appeals, concurring in the judgment of the court, and speaking in reference to a former uncancelled will: 'Here is a good subsisting will properly attested: there is no way to defeat it, but *by proving* it was revoked by another will, *subsisting* at the death of the testatrix, or that she cancelled the latter will, so revoking all former ones, *with a mind to die intestate*.'

CHAPTER XXIII.

OF THE REPUBLICATION OF WILLS.

The republication of a will, operates the revival of a will previously revoked, and brings down the language of the revoked will to the day of republication, and thereby disposes of property, not passing by the will as originally made.

Wills of lands must be republished with all the solemnities prescribed by the 4th sec. of sub-chap. 1. of this act. Not so as to wills of personal estate, they may be republished, not only by an unattested codicil, or other writing, but by the mere parol acts or declarations of the testator. If a will of personalty has been revoked or made at a distant period, afterwards, be sufficiently recognized as his operative will by the parol acts or declarations of the testator, the will so recognized by the testator, becomes as any other written will, his legal will of the date of the recognition. A codicil will amount to a republication of a will to which it refers, whether the codicil be annexed to the will or not, or be, or be not expressly confirmatory of it; for every codicil is in the contemplation of law, part of a man's will, whether it be so described or not. A codicil inaccurately referring to a will, may republish it, if the circumstances of the case demonstrate the will, to which the codicil refers. A formal republication of a will of personal property is not necessary. A mere conservation of a will for many years, may, under the circumstances of the case, amount to a republication. A will made by a woman before marriage, may be confirmed by her during her subsequent widowhood, by a recognition of the will before her marriage, as her then subsisting will, as by her declaring while looking at the will, 'this is my will, and that she would abide by it, that she would not alter it.' But the declaration and circumstances must clearly evince the intent to republish in the testator—for where the testator was in search of another paper, and a person who was assisting him in the search, took up the will by mistake, and handed it to the testator, he said, 'this is my will.' Lord Hardwicke in the case of *Abney vs. Miller*, 2 *At.* 599, ruled that this did not amount to a republication, as it evidenced no *animus republicandi*. Where there are two wills of different dates, both remaining uncancelled, some direct and very unequivocal act of republication is required to set up the will of earlier date, and to revoke the latter; for the presumption of law is in favour of the last will uncanceled. 1 *Will. on Ex.* from 102 to 106.

A codicil with three competent witnesses, executed in the manner prescribed by the statute, may be a republication of the will, so as to give effect to a devise otherwise void, on account of the devisee, being a witness to the original will. *Moir vs. White*, 6 *John. Ch. Rep.* 375. 4 *Dessa.* 482. 1 *Will. on Ex.* 103.

In cases of an alleged republication of a will by parol declarations of the testator, the court will require clear proof of the *animus republicandi*. The words, 'I have left proper persons to manage my affairs,' by a testator in his last sickness will not be ruled a republication. 3 *Dessa. C. R.* 367.

CHAPTER XXIV.

LETTERS TESTAMENTARY OR OF ADMINISTRATION,

HOW AND OF WHOM THEY ARE TO BE OBTAINED.

Letters testamentary or of administration or appointment of guardian, confer no power to sue elsewhere than in the courts of that state, where the letters are granted, or appointments are made. *Fenwick vs. Sears*, 1 *Cranch*, 259. *Williams vs. Storrs*, 6 *John. Ch. Rep.* 358. *Glenn vs. Smith*, 2 *Gill & John.* 502. *Graft vs. Vickey*, 4 *Gill & John.* 332. *Morrell vs. Dickey.* 1 *John. Ch. Rep.* 153.

Mr. Justice Story, in his treatise on the conflict of laws, 422, says, 'it has become a general doctrine of the common law, recognized both in England and America, that no suit can be brought by or against any foreign executor

or administrator, in the courts of the country, by virtue of his foreign letters testamentary or of administration. But new letters of administration must be taken out, and new security given, according to the laws prescribed in the country where the suit is brought. The right of the foreign administrator or executor, is usually admitted to take out administration, as a matter of course, unless some special reasons intervene, and the new administration is treated merely ancillary, or auxiliary to the original foreign administration, so far as regards the collection of the effects and the proper distribution of them. Still, however, the new administration is made subservient to the rights of creditors, *legatees* and *distributees* resident within the country, and the residuum is transmissible to the foreign country only, when the final account has been settled in the proper domestic tribunal, upon the equitable principles adopted by its laws.' The profession in search of the doctrine applicable to the nice and complicated questions growing out of original and ancillary administrations are referred to the above work.

This doctrine of the common law has been partially relaxed, so far as relates to letters testamentary or of administration, (not as to the appointment of guardians,) granted within the District of Columbia.

AN ACT authorizing persons to whom letters testamentary or of administration have been or may be granted in the District of Columbia, to prosecute and recover claims in this state.—1813, *ch.* 165.

Persons to whom letters testamentary, &c. have been granted in District of Columbia, to maintain suit in this state.

Be it enacted by the General Assembly of Maryland, That it shall be lawful for any person or persons to whom letters testamentary or of administration hath been or may hereafter be granted by the proper authority in the District of Columbia, to maintain any suit or action, and to prosecute and recover any claim in this state, in the same manner as if the letters testamentary or of administration had been granted to such person or persons by the proper authority in this state; and the letters testamentary or of administration, or a copy thereof, certified under the seal of the authority granting the same, shall be sufficient evidence to prove the granting thereof, and that the person or persons, as the case may be, hath or have administration.

How and of whom letters testamentary or of administration are to be obtained.

1. When any will or codicil, respecting personal property, shall have been authenticated as aforesaid, or proved as aforesaid before the register of wills, or orphans court, letters testamentary may forthwith be committed to the executor, executrix, or executors, named in the said will or codicil; provided the said executor or executrix, or each of the executors, shall execute a bond to the state of Maryland, with two good sureties, approved by the said register or orphans court, as the case may require, and in such penalty as the said register or court may require, conditioned for the faithful performance of the trust in him or her reposed as executor or executrix, to be lodged and recorded in the said register's office, and subject to be put in suit as hereafter mentioned.—1798, *ch.* 101, *sub ch.* 3.

Bonds.

Will proved in one county, letters may be granted in another, provided, &c.

2. If the executor or executrix, or all the executors named in a will, who shall not have renounced in the manner hereafter directed, shall, in due time, procure an attested copy of the said will, and of the authentication or probat, under the seal of the office where it was authenticated or proved, and shall produce the same to the orphans court, or in its recess to the register of wills, in any county wherein is personal property of the testator or testatrix to be administered, the said will, and the authentication or probat thereof, shall be there recorded; and letters

testamentary may be granted to the said executor or executrix, or all the executors, not renouncing, by the said court, or in its recess by the said register, at any time within forty days from the date of said copy, on his, her or their executing bond or bonds as aforesaid; and in case of sickness of, or accident to, or reasonable excuse made in behalf of any such executor or executrix, the said court or register, may allow a further time, not exceeding thirty days, for filing such bond, and taking such letters; but in no case shall letters testamentary be granted in such county after the expiration of such time allowed, or in any other county except that wherein the will was authenticated or proved; and it shall be the duty of such executor or executrix to transmit to the court where the will was authenticated or proved, a certificate, under the seal of the register of wills of the county wherein letters testamentary shall have been granted, to shew that such letters have been granted.—*Id.*

Bond to be given within 30 days, where the executor was present at taking of probat.

3. If there be only one executor or executrix named, and he or she shall have been present at the authentication or probat of the will, and shall not, within thirty days thereafter, file a bond as aforesaid, or procure an attested copy under seal as aforesaid, for the purpose of taking letters as aforesaid in another county, letters of administration, with the copy of the will annexed, may be granted by the orphans court of the county wherein was the probat or authentication, to such person as they might be granted to in case of intestacy; and if the said executor or executrix, so procuring an attested copy, shall not obtain letters testamentary in some other county, within seventy days from the date of the copy, letters of administration may be granted as aforesaid by the orphans court of the county where the will was proved or authenticated; and it shall not be incumbent on the party applying for or taking such letters of administration, to shew that letters testamentary have not been obtained in some other county on the copy aforesaid; but such letters of administration shall not be granted, if it shall be proved to the court, by affidavit, or certificate under the seal of office, or if they shall have reason to believe, that such letters testamentary have been granted in a county proper for granting them.—*Id.*

Executor not present at the taking of probat to be summoned.

4. In case the said sole executor or executrix shall not have been present at the authentication or probat, but shall have been within the state, a summons may issue against him or her, either at the instance of a person interested, or *ex officio*, by the orphans court, or (in their recess) the register of wills of the county wherein the will was authenticated or proved, returnable not less than twenty, nor more than sixty days after date; and if the summons shall be returned 'summoned,' and the executor or executrix shall not appear accordingly, or appearing shall not, within twenty days thereafter, file a bond or bonds as aforesaid, or if two such summonses shall be returned '*non est*,' and the party shall not appear according to the tenor of the second summons, or appearing shall not, within twenty days thereafter, file a bond as aforesaid, letters of administration may be granted as aforesaid; provided nevertheless, that in case of sickness of, or accident to, such executor or executrix, or reasonable excuse

made in his or her behalf, the court may, at discretion, allow a further time, not exceeding forty days after such return or appearance, for filing such bond.—*Id.*

When executor is out of the state at the time of taking probat.

5. If the said sole executor or executrix be out of the state at the time of authentication or probat, and shall not, within six months thereafter, return and file a bond as aforesaid, letters of administration may be granted as aforesaid; but in case the said executor be out of the state as aforesaid, and shall return, at any time before the expiration of the said six months, in order to expedite the granting of letters, there may be a summons, and the same proceedings thereon, as if he or she had been in the state at the time of authentication and probat, and upon the said proceedings letters of administration may be granted before the expiration of six months; but it shall not be held necessary to proceed by summons as aforesaid, in case the party may be as aforesaid out of the state at the time of authentication or probat, and shall return as aforesaid; but letters of administration, after the expiration of the said six months, may be granted, without such proceeding by summons against the executor or executrix so returning.—*Id.*

More than one executor named in a will.

6. If there shall be more than one executor or executrix named in a will containing any disposition relative to any personal estate, there may be the same proceedings with respect to each of them, as if he or she were the only executor or executrix named; and any circumstances, under which letters of administration may be granted, on failure of a sole named executor or executrix, shall authorize the granting letters testamentary to one or more of the executors, on the failure of one or more of the rest; and any circumstances under which letters of administration may be granted, on failure of a sole named executor or executrix, shall authorize the granting of such letters of administration on failure of all the executors; and in no case, where there are several executors named in a will, shall letters testamentary be granted to one only, or to any number of them less than the whole, or shall letters of administration be granted, until there shall be such proceedings against each of them failing, as would authorize the issuing letters of administration in case of the failure of a sole named executor.—*Id.*

When an executor renounces letters, may &c

7. If any executor or executrix named in a will shall file, or transmit to the orphans court of the county wherein the will shall have been authenticated or proved as aforesaid, an attested renunciation in writing of his or her trust, there may be the same proceedings, with respect to granting letters testamentary or of administration, as if the party so renouncing had not been named in the will; provided nevertheless, that any executor or executrix named in a will, shall be entitled, notwithstanding any failure or renunciation as aforesaid, on filing a bond as aforesaid before letters testamentary or of administration shall actually be committed to another or others as aforesaid, to have letters testamentary granted to him or her, or to be included therein, as the case may require.—*Id.*

8. In cases letters testamentary shall be granted to one or more of the executors named in a will, on failure of the rest, no executor or executrix, not named in the said letters, shall in any manner interfere with the administration, or have any greater interest in the estate of the deceased, than if he or she had not been named in the will as executor or executrix; and if letters of administration, with a copy of the will annexed, shall be granted, no executor or executrix therein named shall in any manner interfere further with the administration, or have any greater interest in the estate aforesaid, than if he or she had not been named as aforesaid; and no executor or executrix named in a will, shall, before letters testamentary shall be granted to him or her, have any power to dispose of any part of the estate of the deceased, or to interfere therewith, further than is necessary to collect and preserve the same; provided nevertheless, that any act of an executor or executrix named in a will, done before obtaining letters testamentary, shall, in case he or she shall afterwards obtain such letters, be as valid and effectual as if the said act had been done after obtaining such letters; and in case of a suit commenced by such executor or executrix, it shall be sufficient to produce the said letters; or a certificate under the seal of the office where they were obtained, that they have been granted to the party at any time before the trial or final hearing on such suit; and in any case whatever where an exhibit of such letters testamentary or of administration would be good or available, a certificate as aforesaid shall also be good and available.—*Id.*

When an executor renounces, not to interfere with the administration

9. It shall not be necessary, in any suit at law or equity brought by or against an executor, executrix or executors, to make a party of any executor or executrix named in the will, who shall not also be named in the letters testamentary, but the making him, her or them, a party or parties by mistake, shall not vitiate any proceeding for or against the proper party or parties.—*Id.*

Suits brought against executors only.

10. Any bond executed by an executor or executrix, or an administrator or administratrix, as hereafter mentioned, shall be recorded in the office of the register of wills where administration is granted; and any person conceiving him or herself interested in the administration of the estate, shall be entitled to, and have on demand, a copy of such bond, and a certificate from the register, under his hand and the seal of his office, upon which copy and certificate an action may be maintained, in the name of the state, for the use of the party interested, and judgment may be recovered, upon such action for the damage actually sustained.—*Id.*

Persons interested in deceased's estate, may sue the bond.

11. The condition of the bond to be passed by any executor or executrix, administrator or administratrix, shall be as follows, or to the following effect: 'The condition of the above obligation is such, that if the above bounden —— —— shall well and truly perform the office of executor or executrix, administrator or administratrix, of —— ——, late of ——, deceased, according to law, and shall, in all respects, discharge the duties of him (or her) required by law, as executor or executrix, or administrator or administratrix, aforesaid, without any injury or damage to any

Conditions of an executor's or administrator's bond.

person interested in the faithful performance of the said office, then the above obligation shall be void; it is otherwise to be in full force and virtue in law.'—*Id.*

Where joint administrators unite in the same testamentary bond, they are jointly answerable, not only each for his own acts, but also each for the acts of the other, when they do not design to incur that responsibility, they should execute separate bonds. *Clarke & wife vs. State*, 6 *Gill & John.* 288.

Actions, when to be commenced

XXI. *And*, forasmuch as disputes have arisen whether the act of limitation extends unto actions brought upon testamentary and administration bonds, *be it further enacted, by the authority, advice and consent as aforesaid*, That all actions upon administration and testamentary bonds shall be commenced within twelve years after the passing of the said bonds, and not after. 1729, *ch.* 24.

Executor or administrator's oath.

12. Every executor or executrix, administrator or administratrix, after filing his or her bond for faithful performance, and before letters shall be committed to him or her, shall be required to take the following oath, or affirmation, as the case may require, to be administered by the register of wills, or orphans court: 'I —— —— do swear, (or solemnly, sincerely and truly do affirm and declare,) that I will well and truly administer the goods, chattels, personal estate and credits, of —— ——, late of ——, deceased, to the best of my knowledge, according to law, and will give a just account of my administration when thereto I shall be lawfully called; so help me God.'—1798, *ch.* 101, *sub ch.* 3.

Form of letters testamentary.

13. The following shall be the form of the letters testamentary to be granted to an executor, or executrix or executors, under the seal of the orphans court: 'Maryland, sc. The state of Maryland, To all persons to whom these presents shall come, greeting. Know ye, that the last will and testament of —— ——, of ——, deceased, hath in due form of law been exhibited, proved and recorded, in the office of the register of wills for —— county, a copy of which is to these presents annexed, and administration of all the goods, chattels and credits, of the deceased, is hereby granted and committed unto —— ——, the executor, executrix or executors, (or one or more of the executors,) by the said will appointed. Witness A. B. chief justice of the orphans court of —— county, this day —— of ——. Test. C. D. register of wills for —— county.'—*Id.*

Letters 'de bonis non.'

2. If an executor or administrator shall die before administration is completed, letters *de bonis non* may be granted, at the discretion of the court, with a copy of the will annexed, (if the case require,) giving preference, however, to the person entitled, if he or she shall actually apply for the same; and the form of the letters shall be as herein before directed, except that the words 'already not administered,' be added in their proper place; and the authority conferred by such letters shall be to administer all things herein described as assets, not converted into money, and not distributed or delivered, or retained by the former executor or administrator, under the court's direction.—1798, *ch.* 101, *sub ch.* 14.

Bonds of executor and guardians answerable for proceeds of sale of real estate.

SEC. 11. *And be it enacted*, That the bond of an executor or executrix, or guardian, which may be hereafter executed, shall be answerable for the proceeds, or sales of the real estate of the testator, testatrix, or ward, as the case may be, or any part thereof, which may come into his or her possession in the same manner, and shall be liable to the same extent as if it were personal estate in his or her hands, and any person conceiving him or herself interested in such estate, or in the proceeds or sales thereof, shall be entitled to, and have on demand a copy of such bond, and a certificate from the register, under his hand and the seal of his office, upon which copy and certificate an action may be maintained in the name of the state, for the use of the party interested, and judgment may be recovered upon such action for the damage actually sustained.—1831, *ch.* 315.

Suit thereon authorized.

CHAPTER XXV.

LETTERS TESTAMENTARY,

TO WHOM THEY MAY BE GRANTED.

To whom letters testamentary may be granted.

1. If any person, named as an executor or executrix in a will, shall be at the time when administration ought to be granted, under the age of eighteen years, or of unsound mind, incapable according to law of making a contract, or convict of any crime, rendering him or her infamous, according to law, or if any person, named as an executor, shall not be a citizen of the United States, letters testamentary, or of administration, (as the case may require,) may be granted, in the same manner as if such person had not been named in the will.—1798, *ch.* 101, *sub. ch.* 4.

Where an alien shall have declared on oath, that it was his intention to become a citizen of the United States, and shall die before he is naturalized, the widow and children shall be deemed citizens upon taking the oath prescribed in act of Congress, March 26, 1804, sec. 2, and therefore, would be entitled to administration.

Summons to be issued before granting letters.

2. No question respecting infamy, citizenship, or competent age, shall be determined by the orphans court, without summoning the persons so named in a will, and alleged to be infamous, alien, or under age, provided he or she be within the state, or without giving such notice, by advertisement, or otherwise, as the court shall direct, (in case he or she be out of the state,) and hearing, in case the party shall attend agreeable to summons or notice.—*Id.*

3. A transcript of the record of conviction shall be evidence in the orphans court to prove the party infamous.—*Id.*

Proof of naturalization.

4. When any person, so named as an executor in a will, shall be alleged to be an alien, or not a citizen of the United States, his citizenship shall not be established otherwise than by a certificate under the seal of the office, or court, where the party became naturalized, or by competent testimony that the said

person is a natural born citizen of this state, or of some of the United States.—*Id.*

Of idiotcy.

5. Any inquisition of a jury, on a writ issued from chancery, finding the party an idiot, lunatic, or *non compos mentis*, and confirmed by the chancellor, shall be conclusive evidence of the unsound mind of the party; and if such an inquisition shall not have been had, at the time when administration ought to be granted, a writ *de lunatico inquirendo* may issue by the chancery or orphans court, on the petition to either of the said courts of any person interested; and the finding of the jury, that the party is an idiot, lunatic or madman, or *non compos mentis*, thereon returned and confirmed by the chancellor or the orphans court, as the case may be, shall be conclusive against the party; and a certificate from the register in chancery, under seal, stating the substance of the proceedings, shall be evidence in the orphans court, who may thereon proceed as if the party had not been named in the will.—*Id.*

Person named executor alleged to be under age.

6. When a person named in a will as an executor or executrix shall be alleged to be under the age of eighteen years, it shall be incumbent on the person making the allegation to establish the same by such proof as is usually required in such cases.—*Id.*

May be granted to an executor at 18.

7. And in case letters testamentary shall be granted to an executor above eighteen, and under twenty-one years of age, the bond by him executed for faithful performance shall be binding as if he were of full age.—*Id.*

No married woman entitled to letters unless her husband gives bond.

8. No married woman shall be entitled to letters testamentary, but the same, or letters of administration, shall be granted, in the same manner as if she had not been named in the will, unless her husband shall, with two sureties, give bond as aforesaid, to be recorded and sued as aforesaid, for her faithful performance; and the bond of any executrix, who is unmarried, and above eighteen, given as aforesaid, shall be binding in the same manner as if she were of the full age of twenty-one years.—*Id.*

CHAPTER XXVI.

LETTERS OF ADMINISTRATION,

TO WHOM AND UNDER WHAT CIRCUMSTANCES THEY MAY BE GRANTED.

To whom, and under what circumstances, letters of administration may be granted.

1. No letters of administration shall be granted to a person infamous as aforesaid, or to an idiot, lunatic, or person *non compos mentis*, or to a person who is not a citizen of the United States, or under eighteen years of age; and any question respecting infamy, soundness of mind, citizenship, or age, may be heard and established as if the same respected a person named as an executor.—1798, *ch.* 101, *sub. ch.* 5.

2. Whenever any person hath died intestate, leaving in this state, goods, chattels, or personal estate, letters of administration may forthwith be granted by the orphans court of the county wherein was the party's mansion-house or residence; or in case he or she had no mansion or residence within the state, letters

shall be granted in the county where the party died; and in case the party neither had mansion or residence, nor died within the state, letters may be granted in the county wherein lies, or is supposed to lie, a considerable part of the party's personal estate.—*Id.*

3. It shall be incumbent on any person applying for such letters, to prove such dying intestate to the satisfaction of the court, unless the same be notorious; and the court may examine such person, on oath or affirmation, touching the time, place, and manner of the death, and whether or not the party dying left any will; and if such dying intestate be not proved to the satisfaction of the court, no letters of administration shall be granted until at least twenty days after the death of the supposed intestate, and at least seven days after application for the same.—*Id.*

The intestacy and death to be proved.

4. If such letters shall be granted, and a will for the disposing of the personal estate of the deceased shall afterwards be proved according to law, and an executor or executrix, or executors, named therein, shall apply for letters testamentary within thirty days thereafter, and shall be capable of the same, and shall execute a bond as aforesaid, letters testamentary shall be accordingly granted, and the same shall be construed as a revocation of the letters of administration; *provided nevertheless*, that all acts done by any administrator or administratrix according to law, before any actual or implied revocation of the letters of administration, shall be valid and effectual; and *provided*, that the executor, executrix or executors, so obtaining letters testamentary, shall thereby be authorized to prosecute any actions at law or equity, commenced by the administrator, administratrix or administrators, and to obtain judgment in his, her or their own names, and likewise to defend any suit, as aforesaid, commenced against the said administrator, administratrix or administrators; and the granting letters testamentary in such case shall not be construed to affect any suit, as aforesaid, commenced against the administrator, administratrix or administrators, but the plaintiff or plaintiffs shall be allowed to prosecute the same unto judgment; nor shall the granting such letters testamentary be construed to affect any suit brought by the administrator, administratrix or administrators, but the same shall be prosecuted unto judgment, unless the executor, executrix or executors, shall come into court and pray that the same be struck off, or discontinued; and the executor, executrix or executors, shall have the benefit of all judgments obtained by the administrator, administratrix or administrators, and shall be bound by all judgments obtained against them, unless the same shall be shewn to have been obtained by fraud, and set aside by the court in which the judgment was rendered, upon such suggestion of fraud, either upon examination in a summary manner into the fact, or by directing an issue to try the same, or unless the said executor shall show to the court that there are good grounds to open the judgment, in which case the court shall and they are hereby authorized to open the said judgment for future litigation; and with respect to the allowance of costs, all administrators shall be on the same footing as if letters testamentary had not been granted, and the same rules in

Will proved Letters of administration revoked.

Suits commenced by administrator to be continued by executor.

Judgment of administrator may be opened.

making the executor or executrix plaintiffs or defendants shall be observed as are directed by the act of one thousand seven hundred and eighty-five, chapter eighty.—*Id.*

Administrator to deliver to executor the estate.

5. And in all cases where letters testamentary shall be granted as aforesaid, it shall be the duty of the administrators to exhibit to the orphans court their accounts, without delay, and to deliver to the executor, on demand, all the goods, chattels and personal estate, in their possession, belonging to the deceased, and on failure, their administration bonds shall be liable to be put in suit by the executors, or the executors may obtain an order for the purpose.—*Id.*

Administration de bonis non, vide 1810, ch. 203, §3.

6. In case any executor, executrix, administrator or administratrix, shall die before the estate shall be fully administered, letters of administration *de bonis non* shall be granted to the person entitled agreeably to the rules herein before laid down, and the proceedings shall in all respects be the same as if administration had been originally granted; and in no case shall the executor of an executor be entitled, as executor, to administration *de bonis non* of the first deceased; and the letters, bond and oath, of an administrator *de bonis non*, shall be in the form herein before directed, except that the words, 'not already administered,' shall be added in the proper places.—*Id.*

Letters de bonis non.

2. If an executor or administrator shall die before administration is completed, letters *de bonis non* may be granted, at the discretion of the court, with a copy of the will annexed, (if the case require,) giving preference, however, to the person entitled, if he or she shall actually apply for the same; and the form of the letters shall be as hereinbefore directed, except that the words 'already not administered,' be added in their proper place; and the authority conferred by such letters shall be to administer all things herein described as assets, not converted into money, and not distributed or delivered, or retained by the former executor or administrator, under the court's direction.—1798, *ch.* 101, *sub ch.* 14.

In *Hagthorp & wife & others vs. Hook, adm. de bo. non.* 1 *Gill and John.* 275, per Chancellor Bland. Letters of adm. de bonis non, only confer an authority to sue for and administer things which are assets, which are not converted into money, and not distributed, or delivered, or retained by the former executor or administrator, under the directions of the orphans court, hence he cannot call the representatives of the previous administrator of the deceased, to account for any property of the intestate, which his predecessor may have wasted; nor can he recover any thing but those goods and chattels, and credits of his intestate, which remain in specie, and are capable of being clearly distinguishable as the property of his intestate. The only remedy for waste or misapplication of assets, is by a suit at law upon the bond by any one interested. He cannot disturb the title of a purchaser, or claim the specific property acquired, under an agreement made by his predecessor, and which it was competent for his predecessor to make. *Hagthorp vs. Neal,* 7 *Gill and John.* 13.

Administrator's qualification, to be the same as executor.

7. The qualification of an administrator or administratrix shall, in all respects, be the same as those of an executor; and the proceedings, to exclude such as *prima facie* appear entitled to the administration of the estate of an intestate, shall in all respects be the same as hereinbefore directed for excluding any

person named in a will as executor or executrix, provided that it shall not be necessary so to proceed, in case the party be out of the state, or in case of administration to be granted to any, except relations, or to collateral relations, more remote than brothers or sisters of the intestate; and no relations, except a widow, child, grand-child, father, brother, sister or mother, shall be considered as entitled, unless he or she shall apply for the same.—1798, *ch.* 101, *sub ch.* 5.

Intestacy of a married woman.

8. If the intestate be a married woman, it shall not as heretofore be necessary for her husband to take out letters of administration, but all her choses in action shall devolve upon her husband in the same manner as if he had taken out such letters; provided, that if he shall not, in his life-time, reduce the said choses in action into possession, or obtain judgment thereon, the said choses in action shall devolve on her representative, and administration may be granted accordingly.—*Id.*

In the case of the *State vs. Krebs*, 6 *Har. & John.* 31, the court of appeals decided that on a commission of partition, under the act to direct descents, the wife's interest in the land undergoes a mutation and is changed into personal property when the commissioner's sale is ratified by the court, and the purchaser has complied with the terms of it, either by paying the purchase money or giving bond for it, according to the terms of sale. The money then is at the disposal of the husband and liable for the payment of his debts, and never can be enjoyed by the wife, but upon the single contingency of her surviving the husband, before any appropriation of it has been made by him.

Actions by husband in right of his wife.

9. And hereafter a husband, bringing a personal action to recover in right of his wife, either before or after her death, may declare specially, setting forth in the usual manner, how the debt or right accrued to his wife, and stating further, that by marriage the debt or right hath on him devolved.—*Id.*

Persons who are first entitled to letters of administration.

10. If the intestate leave a widow, and a child or children, administration at the discretion of the court, shall be granted either to the widow or child, or one of the children.—*Id.*

11. If there be a widow, and no child, the widow shall be preferred, and next to the widow or children, a grand-child shall be preferred.—*Id.*

12. If there be neither widow, nor child, nor grand-child, the father shall be preferred.—*Id.*

13. If there be neither widow, nor child, nor grand-child, nor father, brothers and sisters shall be preferred, and next to brothers and sisters, the mother shall be preferred.—*Id.*

14. If there be neither widow, nor child, nor grand-child, nor father, nor brother, nor sister, nor mother, the next of kin shall be preferred.—*Id.*

15. Males shall be preferred to females in equal degree of kin.—*Id.*

16. Relations of the whole blood shall be preferred to those of the half blood in equal degree, and relations of the half blood shall be preferred to relations of the whole blood in a remoter degree.—*Id.*

17. Relations descending shall be preferred to relations ascending in the collateral line; that is to say, (for example,) a nephew shall be preferred to an uncle.—*Id.*

18. None shall be preferred in the ascending line beyond a father or mother, or in the descending line below a grand-child.—*Id.*

19. A female sole shall be preferred to a married woman in equal degree.—*Id.*

20. Where a female is entitled, administration may be granted to her and her husband, provided he be capable.—*Id.*

21. Relations on the side of the father shall be preferred to relations on the side of the mother in equal degree.

Creditors.

22. If there be no relations, administration shall be granted to the largest creditor applying for the same.—*Id.*

When granted at the discretion of the court.

23. If there shall be neither husband, nor wife, nor child, nor grand-child, nor father, nor brother, nor sister, nor mother, or if these be incapable or decline, or refuse to appear on proper summons or notice, or if other relations and creditors shall neglect to apply, administration may be granted, at discretion of the court.—*Id.*

Residuary legatee.

24. If however letters of administration are to be granted, with a copy of the will annexed, and there be a residuary legatee or legatees in such will, he, she or they, shall be preferred to all, except a widow, and it shall be incumbent on the court to proceed in the manner hereinbefore directed, with respect to executors within the state, before administration shall be granted to any other person; and a male residuary legatee shall be preferred to a female.—*Id.*

Letters of administration may be granted to two or more

25. Administration may be granted to two or more persons, with the consent of the person first entitled, provided that administration, in all cases, shall extend to all the personal property of the deceased within the state, in order that the affairs of deceased persons be as little complicated as may be, and that persons interested therein may the more easily and readily obtain justice.—*Id.*

1. If any person entitled to administration, shall deliver, or transmit to the orphans court, a declaration in writing, that he is willing to decline the trust, the court shall proceed as if such person were not entitled.—1798, *ch.* 101, *sub ch.* 14.

Where validity of a will is contested, letters of administration may be granted to persons named as executors.

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6. *And be it enacted*, That in all cases where the validity of a will is or shall be contested, letters of administration pending such contest may, at the discretion of the orphans court, be granted to the person named executor, or to the person to whom the largest portion of the personal estate may be bequeathed in such contested will, or to the person who would be entitled to letters of administration by law as in cases of intestacy: *provided always*, that upon a decision had on such contested will, the same proceedings shall be had, and the same rules apply, as to the completion of the administration, according to the circumstances of the case, as are prescribed by the fifth chapter of the act to which this is a supplement.—1810, *ch.* 34.

CHAPTER XXVII.

WHEN LETTERS AD COLLIGENDUM MAY BE GRANTED.

Letters authorizing collection.

14. In case of delay, on account of the absence from the state of an executor, executrix, or executors, named in a will, or of a contest relative to the right of administration, or of a contested will or codicil, or of the negligence of any executor or executrix named in the will, to take out letters testamentary, or the absence or negligence of any person entitled to letters of administration, or on any other account, the orphans court of the county wherein the will was proved or authenticated, or where letters of administration ought to be granted, may, at discretion, issue letters, authorizing the collection and preservation of the goods of the deceased, and the returning an inventory thereof; and the said letters may, at the discretion of the court, be directed to one person only, or to several persons, in case the goods or chattels and personal estate of the deceased shall be supposed to be in different counties.—1798, *ch.* 101, *sub ch.* 3.

Their form.

15. The form of such letters shall be as follows: 'Maryland, sc. The State of Maryland, to all persons to whom these presents shall come, greeting: Know ye, that whereas —— ——, of ——, deceased, as it is said, had, at his, (or her) decease, personal property within this state, the administration whereof cannot immediately be granted, but which, if speedy care be not taken, may be lost, destroyed or diminished; to the end, therefore, that the same may be preserved for those who shall appear to have a legal right or interest therein, we do hereby request and authorize —— ——, of ——, to secure and collect the said property, wheresoever the same be in this state, (or in —— county or counties,) whether it be goods, chattels, debts or credits, and to make or cause to be made a true and perfect inventory thereof, and to exhibit the same with all convenient speed, together with a reasonable account of his collection, into the office of the register of wills for —— county. Witness A. B. chief justice of the orphans court for —— county. Test, C. D. register of wills for —— county.'—*Id.*

Collector's bond.

16. But before letters to collect shall be granted, the party shall give bond, with approved security, to be filed, recorded and sued as aforesaid, in such penalty as the court shall direct, and the condition thereof shall be as follows: 'The condition of the above obligation is such, that if the above bounden —— ——, shall well and honestly discharge the office of collector of the goods, chattels, and personal estate and debts of —— ——, deceased, in the state of Maryland, (or —— county,) and shall make or cause to be made, a true and perfect inventory or inventories of such of the said goods, chattels, personal estate and debts, as shall come to his or her possession or knowledge, and the same shall in due time return to the register of wills of —— county, and shall also deliver to the person or persons who shall be authorized by the orphans court of the said county to receive them, such of the said goods, chattels, personal estate and debts, as shall come to his or her possession, (except such as shall be

allowed for by the said court,) then the above obligation is to be void, or is otherwise to remain in full force and virtue in law.'—*Id.*

Collector's oath.

17. And every collector as aforesaid shall be required, on granting the said letters, to take the following oath, or affirmation as the case may require: 'I —— —— do swear, or affirm, as the case may be, that I will well and honestly discharge the office of collector of the goods, chattels, personal estate and debts of —— ——, deceased, according to the tenor of the letters granted to me by the orphans court of —— county, and agreeably to the directions of law, to the best of my knowledge; so help me God.'—*Id.*

Collector's duty and commission.

18. Every collector so appointed shall have power to collect the goods, chattels, personal estate and debts, according to the tenor of the said letters, and to secure the same at such reasonable and necessary expense as shall be allowed by the court; and the court may authorize him, immediately after appraisement, to sell such as shall be perishable, or not to be preserved, and to account for the same; and for the whole trouble incurred by a collector, the court may allow a commission on the amount of the property and debts actually collected, and afterwards delivered to an executor or administrator, as to the court shall seem just, not exceeding three per cent. or the court may allow a commission on the whole inventory not exceeding two per cent.—*Id.*

On granting letters testamentary, collector's power to cease.

20. On the granting of letters testamentary or of administration, the power of any such collector shall cease, and it shall be his duty to deliver, on demand, all the property and money of the deceased in his hands, except as before excepted, to the person or persons obtaining such letters; and in case of the collector's evading such demand, or refusing or neglecting to deliver according to such demand, made at a reasonable time and place, either the court may proceed against him by attachment, and impose a fine not exceeding ten per cent. on the amount of property in his hands, unless in the case of the minority of the executor or executrix, then and in such case letters of administration, during the minority of such executor or executrix, shall be granted; the age of eighteen years to be considered as the age of majority for the purposes of this clause; or his bond may be sued by the executor or administrator.—*Id.*

Where letters have issued to any person, he may sue to recover debts.

Sec. 5. *And be it enacted*, That in all cases where letters have issued, or hereafter may issue, to any person to collect and preserve the estate of a deceased person, it shall and may be lawful for such collector, after complying with the requisites prescribed by the said original act, to bring suits for the recovery of debts, or other property of the deceased, in the same manner as an executor or administrator might or could do, and that the property recovered or received by the collector shall be delivered to the person obtaining the letters testamentary or of administration, and in case of neglect or refusal, such collector may be proceeded against in the same manner as prescribed by said act: *provided*, that in case such letters shall be revoked, pending any such action, either by the express revocation of the court who issued the same, or by the granting of letters testamentary or of administration on the same estate, there shall be the same proceedings

Proviso.

and the executor or administrator, as the case may be, shall have the same authority and control over any such action, as in cases where the letters testamentary or of administration of any plaintiff are or shall be revoked.—1802, *ch.* 101.

CHAPTER XXVIII.

GENERAL POWERS OF EXECUTORS AND ADMINISTRATORS.

It is a general rule of law and equity, that an executor or administrator has an absolute power of disposal over the whole property of the deceased, and that it cannot be followed either by a general or specific legatee into the hands of the alienee. 2 *Will. on Ex.* 609. 2 *Hen. & Mum.* 6. 2 *Ran.* 294. 7 *John. Chan. Rep.* 155. If there be collusion between the executor or administrator and the purchaser, and the purchaser knows that it is not necessary to sell any part of the estate, for the payments of the debts of the deceased, equity, at the instance of the creditor, or any person interested in the fund, will not protect such purchaser. 2 *Hen. & Mum.* 69. 2 *Ran.* 294. 2 *Mad. Chan.* 288. 7 *John. Chan. Rep.* 155. *Shield vs. Scheuplen.*

Whether an executor can pledge the assets of the estate, to secure the payment of a debt due by himself is a vexed question. The subject has been most laboriously investigated by Chancellor Kent, in the preceding case of *Shield vs. Scheuplen.* After reviewing all of the English authorities, sustaining the power of the executor to do so, and the modification of the right, he says, 'they all agree in opinion in this, that the purchaser is safe, if he is no party to any fraud in the executor, and has no knowledge or proof, that the executor intended to misapply the proceeds. The latter and better doctrine is, that in such a case, he does buy at his peril. The great difficulty has been to determine how far the purchaser dealt at his peril, when he knew from the very face of the proceeding, that the executor was applying the assets to his own private purposes, as the payment of his own debt. The latter and better doctrine is, that in such case he does buy at his peril; but that if he has no such proof or knowledge, he is not bound to inquire into the state of the trust, because he has no means to support the inquiry, and he may repose on the general presumption that the executor is in the due exercise of his trust.' This doctrine was reviewed by Judge Stephens, with his usual industry and ability, in the case of *Allender vs. Reston,* 2 *Gill & John.* 97, but as in the opinion of the court, the administrator did not act at the time the mortgage was executed in a representative character, the court declined expressing any definite opinion upon this interesting branch of testamentary law.

CHAPTER XXIX.

RULES CONCERNING INVENTORIES.

Rules concerning inventories.

1. In every case where letters testamentary, or of administration, or of collection, are granted, in order that all persons interested in the personal estate may have an opportunity of knowing, as nearly as may be, the amount of the same, an inventory, in case the estate lies in one county, or can conveniently be collected together, or inventories, in case the property lies in more than one county, or cannot conveniently be collected together, shall be returned to the office granting the administration.—1798, *ch.* 101, *sub ch.* 6.

2. And on granting any letters testamentary, or of administration, or of collection, a warrant or warrants shall issue, under

Warrant to be issued to the appraisers.

the seal of office, authorizing two persons of discretion, not related to the deceased, nor interested in the administration, to appraise the goods, chattels and personal estate, of the deceased, known to them, or to be shown by the executor, administrator or collector. Form of the warrant. 'The State of Maryland, To —— —— and —— ——, greeting: This is to authorize you jointly to appraise the goods, chattels and personal estate, of —— ——, late of —— deceased, so far as they shall come to your sight and knowledge, each of you having first taken the oath, or affirmation, hereto annexed, a certificate whereof you are to return, annexed to an inventory of the said goods, chattels and personal estate, by you appraised, in dollars and cents; and in the said inventory you are to set down, in a column or columns opposite to each article, the value thereof. Witness C. D. chief justice (or judge) of the orphans court in —— county. Test. E. F. Register, &c.'—*Id.*

3. And on the death, refusal or neglect to act, of any appraiser, another warrant may forthwith issue in its stead.—*Id.*

Oath of appraisers.

4. The appraisers, before they proceed to act, shall take the following oath, or affirmation as the case may be, annexed to, or endorsed on, the warrant, before any person authorized to administer an oath: 'I, A. B. do swear, or solemnly, sincerely and truly affirm, that I will well and truly, without partiality or prejudice, value and appraise the goods, chattels and personal estate, of —— ——, deceased, so far as the same shall come to my sight and knowledge, and will, in all respects, perform my duty as appraiser, to the best of my skill and judgment; so help me God.'.—*Id.*

Appraisers duty.

5. The appraisers shall proceed as conveniently as may be to the discharge of their duty, and shall set down each article, with the value thereof, in dollars and cents; all the valuations on one side of the paper shall be set down in one column, distinctly, in figures, opposite to their respective article; the contents of each column shall be cast up and set down, and likewise the contents of the whole shall be cast up, and set down under the last column.—*Id.*

Inventory to be returned.

6. When the inventory shall be finished, the appraisers shall certify the same, under their hands and seals, and a certificate of their having taken the oath or affirmation as aforesaid, shall be thereto annexed; and every inventory shall be returned to the proper office within three calender months from the date of the letters, or within such time from the date of the warrant, in case a second warrant shall have issued, as the case may require, unless further time, on application of the party, shall be granted by the court; and it shall be the duty of the executor, administrator or collector, taking out the warrant, to return the inventory or inventories which shall be delivered to him by the appraisers; and on failure by the executor, administrator or collector, attachment may issue to enforce the return; and on the attachment the court shall have power to fine the party not exceeding thirty dollars.—*Id.*

Penalty for neglect.

7. If there be any of the persons interested in the administration within three miles of the place where the personal estate is

to be appraised, it shall be the duty of the executor, administrator or collector, and of the appraisers, to give notice to the said persons, or at least two of them, of the time and place appointed for making the appraisement.—*Id.* Notice to be given to relations.

8. Every executor, executrix, administrator or administratrix, shall return likewise within time, and under the pain aforesaid, with an affidavit of the truth annexed, an inventory of the money belonging to the deceased which hath come to his or her hands, and of the debts due to the deceased which have come to his or her knowledge, specifying the nature of each debt, and setting down such as he or she shall deem sperate, distinct and separate from those which he or she shall deem desperate or doubtful.—*Id.* List of debts.

9. Every collector likewise shall return, within the time, (unless superseded) and under the form aforesaid, with an affidavit of the truth annexed, an inventory of the money of the deceased, which he or she hath collected, belonging to the deceased, or received in discharge of debts due to the deceased.—*Id.* Collector's inventory.

10. Whenever personal property of any kind, or assets not mentioned in an inventory already made out, shall come to the possession or knowledge of an executor, executrix, administrator or administratrix, or collector, an account or inventory of the same shall be returned, appraised by two respectable disinterested sworn appraisers, appointed by any justice of the peace, or judge of any orphans court, within two calendar months from the time of the discovery.—*Id.* Additional inventory.

11. In case an inventory be returned by a collector, duly appointed, the executor, executrix, or executors, or administrator, administratrix, or administrators, thereafter administering, shall within three calendar months after the date of his, her or their letters, either return a new inventory, in place of the collector's inventory, or any acknowledgment in writing, that he, she or they, have received from the collector the articles contained in the first inventory, or consent to be answerable for the same, in the same manner as if the said inventory had been made out after his, her or their administering upon the estate; *provided*, that nothing herein contained shall be construed to render any executor, executrix or executors, administrator, administratrix or administrators, answerable for not making a return of the inventory aforesaid, wherein it shall appear to the court that he, she or they, have been prevented from making such return by the improper detention of the goods of the deceased by the collector aforesaid.—*Id.* Collector's inventory will do for administrator, provided he signifies his assent in writing.

12. The executor or administrator shall either finish the crop on hand at the death of the deceased, or sell the same, as he shall judge the most convenient; and in case he shall not deem it convenient to finish the crop, the person entitled to the land on the death of the testator or intestate, or his or her guardian or next friend for him or her, in case of infancy of the party, may take the said crop at the appraisement of the appraisers as aforesaid, paying ready money or giving bond, with good security, approved by the orphans court, or the register of wills of the Crop on the ground at deceased's death.

said court, if the said court be not in session at the time of making such sale, for paying the money within six months; and in case the said party, or his or her guardian for him or her, shall not take the crop at an appraisement, the executor or administrator may sell the same to any other person, for ready money, or on credit as aforesaid; *provided, nevertheless*, that he shall not sell it at less than the appraisement, without the approbation of the orphans court granting the administration, or an order, prescribing the terms, by the said court, passed as aforesaid.—*Id.*

Executor or administrator failing to return an inventory—letters may be revoked, &c

13. If an executor or administrator shall not, within three months after the date of his letters, exhibit to the orphans court an inventory as aforesaid, a summons, returnable within not less than eight, or more than thirty days, may, *ex officio*, or on application of a person interested, be issued against such executor or administrator, to shew cause wherefore such inventory hath not been exhibited; and if the summons be duly returned 'summoned,' or upon two citations returned '*non est*,' by the sheriff of the county wherein the party resided at the time of obtaining his letters, or of the county wherein the letters were obtained, in case the party doth not reside in the state, and if he doth not appear at the return of the summons, or appearing shall not shew cause satisfactory, the said court may immediately enter on its proceedings, and record, that the said letters be revoked, and may proceed to grant other letters, in the same manner as if such executor had not been named in the will, or as if such administrators were not in existence; and the power of such executor or administrator shall thereupon cease, and he shall be bound to deliver up on demand, to the person obtaining such letters, all the property of the deceased in his hands, or be liable to be sued by such person on his administration bond, or the court may pass an order for the purpose.—*Id.*

One executor may return an inventory.

14. If there be more than one executor or administrator named in the letters, any one or more of them, on the neglect of the rest, may return an inventory, and the executor or administrator so neglecting shall not thereafter interfere with the administration, or have any power over the personal estate of the deceased; but the executor or administrator so returning shall thereafter have the whole administration, unless, within two months after the return, the delinquent or delinquents shall assign to the court some reasonable excuse which it shall deem satisfactory.—*Id.*

Executor may give bond to pay debts and legacies.

6. No executor shall be obliged to exhibit any inventory, or account, provided he will give bond, instead of the bond hereinbefore directed, with such security, and in such penalty, as the court shall approve, to the state of Maryland, to be recorded and sued as before directed, with condition 'for paying all just debts of, and claims against the deceased, and all damages which shall be recovered against him as executor, and also all legacies bequeathed by the will,' provided the said executor be residuary legatee, or provided the residuary legatee of full age, shall notify his or her consent to the court; and in case such bond be given by an executor, he shall be answerable for all debts, claims and damages, recovered against him as executor;

and if suit be brought against him as executor, the judgment shall be for the whole sum found by the jury, or otherwise ascertained, and execution may issue, and have effect, as if he were sued in his own right; and any legatee shall be entitled to recover the full amount of his legacy, either in a suit upon the said executor's bond, or in a suit in chancery, as is usual in case of legacies, or in an action on the case, in which the giving of such bond shall be considered as an assent to the legacy.—1798, *ch.* 101, *sub ch.* 14.

A testamentary bond, not pursuing the formula described by this section, ruled good upon demurrer. *Hamilton vs. State, use of Jameson,* 3 *Har. & John.* 503.

A bond required from executors, under this section, is a testamentary bond, within the meaning of the act of limitations of 1729, ch. 24, sec. 21. *State vs. Boyd,* 2 *Gill & John.* 365.

Where an executor has given bond under this section, he cannot in an action against him plead nulla bona, or ple. adm. and this though the action is not founded on the bond. *State, use of Barber vs. Hammond,* 6 *Gill & John.* 157.

An original paper, purporting to be 'an additional inventory to the inventory of the deceased, offered by the administrator,' proved to be in the hand-writing of a person who acted as clerk for the administrator, and endorsed, 'additional inventory,' in the hand-writing of the administrator, found among the papers in the office of the register of wills, wrapped up in the original inventory of the estate of the deceased—*held* to be competent evidence to charge the administrator with the amount of such additional inventory. *Emory vs. Thompson,* 2 *Har. & John.* 244.

7. No administrator, entitled to the whole residue after payment of debts of, and claims against, the intestate, shall be obliged to return an inventory or account, provided he will give bond, with such security and such penalty, as the court shall approve, conditioned for paying all debts, claims and damages, which shall be recovered against him, as administrator; and in case he shall give such bond, he shall be answerable for all debts, claims and damages aforesaid, and judgment may be given, and execution may issue and have effect, as herein directed with respect to an executor giving a similar bond.—1798, *ch.* 101, *sub ch.* 14.

Administrator may give bond to pay debts and claims, and not return an inventory.

Sec. 1. *Be it enacted by the General Assembly of Maryland,* That the wearing apparel of deceased persons be and the same is hereby exempt from appraisement and sale, in all cases where there shall be a widow, or child, or children, or grand-child or grand-children, and that the said wearing apparel shall belong to, and be the property of the child or children of the deceased, and if there be no child or children, then the same shall belong to and be the property of the grand-child or grand-children of the deceased, and if there be neither child nor grand-child, then the same shall belong to and be the property of the widow of the deceased.—1830, *ch.* 17.

Apparel exempt from appraisement.

Sec. 2. *And be it enacted,* That the wearing apparel of deceased persons, exempt from appraisement and sale under this act, shall not be deemed or taken to include watches or jewelry of any description.—*Id.*

Watches, &c. not to be included.

Sec. 3. *And be it enacted,* That in all cases in which the wearing apparel of a deceased person is exempted from appraise-

Distribution to be made.

ment and sale by virtue of the provisions of this act, it shall be the duty of the executor or administrator of such deceased person, to make such distribution of such wearing apparel, as he may consider equitable and proper, when there are more persons than one entitled thereto, and the same to deliver to the person or persons entitled to the same, according to the provisions of the first section of this act.—*Id.*

The provisions of this act are inconsistent with the act of 1828, chap. 145.

CHAPTER XXX.

ASSETS.

Assets.

Leases for years, estates for the life of another person or persons, except those granted to the deceased and his heirs only, and all goods, wares, merchandise, utensils, furniture, negroes, cattle, stock, provisions, tobacco, and every kind of produce, the crop on the land of the deceased by him or her begun, unless where the lands are divided, things annexed to the freehold or building, which may be removed without prejudice to the building, clothing, ornaments, and every other species of personal property, (except those things which are denominated heir-looms, and the clothes of a widow, and ornaments and jewels proper for her station, and the clothing of the family,) shall be included in an inventory to be taken and returned as aforesaid, and shall be considered as assets in the hands of an executor or administrator. 1798, *ch.* 101, *sub ch.* 7.

Crops growing on land of deceased to be considered as assets.

2. *And be it enacted*, That the crop growing on the land of any deceased person at the time of his or her death, *except where the land is devised*, shall be considered, and is hereby declared, to be assets in the hands of an executor or administrator, and shall be included in the inventory to be taken and returned according to the original act.—1802, *ch.* 101.

Crop growing upon land devised to be considered as assets, &c.

1. *Be it enacted by the General Assembly of Maryland*, That after the first day of October next, the crop growing upon land devised by any deceased person, and by him or her begun, shall be deemed and considered as assets in the hands of an executor or administrator, in the same manner that the crop growing upon land not devised is.—1807, *ch.* 136.

Interest on money due for property sold by executors or administrators to be considered as assets.

1. *Be it enacted, by the General Assembly of Maryland*, That in all cases in which the executors, or administrators of any deceased person have received, or shall hereafter receive, any sum or sums of money for interest on money due and owing for property sold by them by order of the orphans court of any county in this state, that such money shall be considered as assets belonging to the estate of such deceased, and shall be accounted for by them, in the same manner as other assets are directed to be accounted for by the original act to which this is a further additional supplement.—1818, *ch.* 217.

2. *And be it enacted*, That in all cases in which the executors or administrators of any deceased person have received, or shall hereafter receive, any sum or sums of money, for the hire

or use of any slaves or servants belonging to the estate of such deceased during the time in which the said executor or administrator may be entitled, by law, to the possession of such *slaves* or servants, that such money shall be considered as assets belonging to the estate of such deceased, and as such shall be accounted for, and a due allowance shall be made to such executor or administrator for all expenses incurred by him or her in the support and maintenance of the negroes belonging to such estate; *Provided*, that nothing in this act contained shall apply to or affect executors or administrators who may have completed and settled the administration on the estates of their testators or intestates before the passage of this act.—*Id.*

Money received for hire of slaves belonging to estate of deceased, &c. to be considered as assets.

Proviso.

Such was the law even before the passage of this act. The act of 1798, chap. 101, sub chap. 7, having made negroes assets, the hire of them, after the death of the owner became assets. The hire of them is an incident springing out of the assets, and it is like the interest accruing after the death of the obligee on a bond given to him in his life-time. *Edelen vs. State*, 4 *Gill & John.* 277.

Clover and hay growing on real estate are not emblements, and do not, as such, form a part of the personal estate—they pass to the devisee, not to the executor. Crops planted or sown by the testator in his life-time, and which are gathered during the summer and autumn next succeeding his death, are a part of the personal estate. *Evans vs. Iglehart*, 6 *Gill & John.* 191.

The increase and income resulting from personal property, specifically bequeathed, when the assets are abundantly sufficient to pay debts and legacies, enure to the benefit of the specific legatee and form no part of the general residue of the personal estate.—*Id.*

5. *And be it enacted*, That the bonds, notes or accounts, that may be delivered to him as aforesaid, when collected, and the money paid over to him as aforesaid, shall be assets in his hands, to be accounted for by him as such.—1820, *ch.* 174.

Bonds delivered over by an executor of deceased executor, to be assets.

The personal estate of the deceased debtor is the natural fund for the payment of his debts, and must in ordinary cases, be first resorted to by the creditors. The real estate is protected unless the personal assets are insufficient. *Wise vs. Smith & Buchanan*, 4 *Gill & John.* 295.

The real estate of the debtor is protected, unless the personal assets are insufficient, and to authorize the chancellor to pass a decree for the sale of the real estate, the bill must charge that the personal assets are insufficient for the payment of the debts, and that allegation must be sustained by proof or the admission of the heirs.—*Id. per Chancellor Bland.*—*Id.*

The only remedy at present for any waste or misapplication, by the administrator or executor, is by an action at law upon his official bond, by any person interested. *Hagthorp vs. Hook*, 1 *Gill & John.* 273.

The legal title to the assets of intestate vest in his administrator, who is considered as to them his legal representative. Between the death and granting letters of administration, the title is suspended and vest in no one.—*Id.*

Length of time constitutes no bar to the recovery of them by the rightful administrator, from the possession of one who may have taken them into possession, after the death of the intestate, and before the granting of letters of administration. *Hepburn vs. Sewell*, 4 *Har. & John.* 894. *Hagthorp & wife vs. Hook.* 1 *Gill & John.* 272.

In the hands of an executor or administrator cannot be taken in execution for his own debt. 4 *Term Rep.* 621. 2 *Tucker's Com.* 406.

CHAPTER XXXI.

ACCOUNTS OF ADMINISTRATION.

THE CONDUCT OF EXECUTORS AND ADMINISTRATORS RELATIVE TO PAYING AND COLLECTING DEBTS.

Proceedings by the orphans court, to enforce obedience to their decrees and orders are collected under title 'jurisdiction.'

Accounts of administration, and the conduct of executors and administrators relative to paying and collecting debts.

1. Every executor or administrator shall, within fifteen calendar months after the date of his or her letters, return to the court which granted them a full account of his or her administration: *provided, nevertheless*, that if the said party shall, within four calendar months after the said date, make oath, (or affirmation, as the case may require,) that he or she hath reason to apprehend, and doth apprehend, that the personal estate and assets which are or shall be in his or her hands, will be insufficient to discharge the just debts of, and claims against the deceased, the court may, at discretion, allow a further time, not exceeding eighteen calendar months in the whole, from the said date, for returning the said account.—1798, *ch.* 101, *sub ch.* 8.

This section is re-modelled by the 3d section of 1831, ch. 315.

Executor and administrator shall pass first account within twelve months. His letters may be revoked.

SEC. 3. *And be it enacted*, That it shall be the duty of every executor or administrator hereafter qualified, to render to the orphans court of the county in which he may have received letters testamentary, or of administration, within the period of twelve months from the date of such letters, the first account of his administration, and in case he shall fail to do so, his letters may in the discretion of such court be revoked, and the court may, if there be no remaining executor or administrator, appoint a new administrator.—1831, *ch.* 315.

Increase or decrease of property.

2. The orphans court granting the letters shall have power to make allowance to any collector, executor or administrator, for property of the deceased which hath perished or been lost, without the fault of the party; and no profit shall be made, and no loss shall be sustained, by an executor or administrator, in the increase or decrease of the estate under his management; but the executor or administrator shall return an inventory and account for such increase, and may be allowed for such decrease. on the settlement of the final or other account.—1798, *ch.* 101, *sub ch.* 8.

Sale for payment of debts.

3. In case any executor or administrator shall not have money sufficient to discharge the just debts of, and claims against the deceased, the orphans court granting the letters shall, on his application, made after the return of an inventory, direct a sale of the whole property therein contained, or of such part, or to such amount, as the court may think proper, and the court shall direct the manner and terms of sale, provided that no credit exceeding twelve months be given, in any case, and that where credit is given, bond with security shall be taken; the court shall have power, in case it shall suspect any fraud, collusion, connivance or improper management, to affect the said sale, or that it was unreasonably made, or that the property was sold

Fraud in sale, &c.

much under its value, to compel the said executor or administrator, to account for all such deficiencies as may have arisen by such executor's or administrator's misconduct, the court always observing the inventory as their rule for ascertaining such deficiency.—*Id.*

Where an administrator sold property of the deceased and took bond without security from the purchaser, who proved insolvent, he was held responsible. 3 *John. C. C.* 532.

When an administrator, in execution of an order of the court for the sale of the personal property, took bond with one surety, for seventy-two dollars, which not being paid, he did not sue, at the next succeeding term after default of payment, but sued to the court next thereafter, and obtaining judgment, issued a fi. fa. which did not procure the money, he is not called on to prove the sufficiency of the bond to obtain credit for such sale, nor is the failure to sue at the first term, of itself an act of negligence. *Gwynn vs. Dorsey*, 4 *Gill & John.* 453.

Where an administrator intends fairly to do his duty, the rule should be, not to hold him liable upon slight grounds.—*Idem.* 4 *John. Chan. Rep.* 419. *Gwynn vs. Dorsey*, 4 *Gill & John.* 453.

Where they suffer debts to be lost by wilful negligence, or want of ordinary care or diligence in either of them, the loss ought to be charged to both or to one of them, to whom the default is justly to be imputed. 7 *John. Chan. Cases*, 23. 4 *John. Chan. Rep.* 619. *Hurst vs. Fisher*, 1 *Har. & Gill*, 88.

An administrator omitting to recover debts due on securities, which came into his hand by a solvent debtor residing in another state, is liable for the amount of such notes. This decision of the Chancellor, is sustained by an elaborate opinion, and is not the result of any peculiar provision of the New York system. *Shultz vs. Pulvier*, 3 *Page's Chan. Rep.* 182.

Where an administrator of a deceased partner, *bona fide*, permitted the surviving partner to sell the partnership stock, in the usual course of trade, and forbore to call on the court for its direction, he was not responsible to the creditors for any loss sustained in carrying on the business. 4 *John. Chan. Rep.* 619. Aliter if the administrator of the deceased partner, put into trade, the assets which he had in possession.—*Idem.*

The orphans court have the power to make the administrator account for interest on money belonging to the estate, which he has applied to his own use, or neglected to distribute or pay over. This is a familiar subject in equity, as applied to trust, and there is no reason why the power should not be exercised in relation to executors and administrators, as they exercise such authority in making an administrator account for the hire of the negroes of an estate, which he employed for his own use. *Gwynn vs. Dorsey*, 4 *Gill & John.* 461. And a controversy among the creditors as to a portion of the fund, forms no reason to exempt him from his responsibility to pay interest, as he might have retained the disputed dividend, or a portion of it, under the direction of the orphans court.—*Idem.*

Money retained in the hands of an administrator by consent of parties, and with the sanction of the orphans court, to answer the supposed wants of an estate, does not bear interest. *Wilson vs. Wilson*, 3 *Gill & John.* 20.

Interest will be allowed against an executor where he appears to have made interest, or employed the funds of the estate for his own use. 3 *Mum.* 288. Aliter where the money has laid in his hands unproductive, in consequence of a dispute, to whom it was to be paid, or because there was no hand to receive it, as in case of an infant without a guardian. 3 *Mum.* 198. *Handy vs. State*, 7 *Har. & John.* 43.

Where an executor negligently leaves an estate unsettled for ten years, and then suffers the accounts of the estate to remain before the auditor of the court of equity for several years, before any statement was reported, he is justly chargeable with interest. *Lyles vs. Hatton*, 6 *Gill & John.* 122.

After an estate had been ten years in the hands of an executor, he was notified of a claim on the part of the United States, and upon his application the orphans court permitted him to retain in hands a sum sufficient to abide the event, the claim was afterwards defeated. *Held*, that under the circumstances of this case, the order of the orphans court ought not, like an injunc-

tion against payment, to be regarded as a sufficient ground for the suspension of the payment of interest on the sums due the distributees.—*Id.*

Compound interest is not allowed in favor of an executor or trustee. It is sometimes permitted against them, as when he refuses to disclose the profits made out of the state or trust fund. 5 *John. Chan. Rep.* 497.

Where a trustee received large sums of money from the estate, which he continually employed in trade and speculation, and upon a bill being filed to obtain a discovery, he attempted by untenable defences, to stifle the inquiry as to what he had made of the money, and the profits resulting from it, he was held to pay compound interest. *Diffenderffer vs. Winder*, 3 *Har. & John.* 311. *Darne vs. Catlet*, 6 *Har. & John.* 475. *Dunscomb vs. Dunscomb*, 1 *John. C. C.* 508. *Manning vs. Manning, id.* 527.

Schæffer vs. Stewart, id. 620. *Munford vs. Munford*, 6 *id.* 452. *Ringgold vs. Ringgold*, 1 *Har. & Gill*, 12, establish the principle that a trustee is chargeable with interest if he has used the trust fund, or has omitted to invest it so as to make it productive.

An executor or administrator cannot buy at his own sale. *Conway vs. Green*, 1 *Har. & John.* 151. *Davis vs. Simpson*, 5 *Har. & John.* 147. *Singstack vs. Harding*, 4 *Har. & John.* 186. *Scott vs. Burch*, 6 *Har. & John.* 67. In *Williams vs. Marshall*, 4 *Gill & John.* 376, the court say there is many exceptions to and modifications of this rule; a trustee who purchases at his own sale, may be treated in chancery, according to circumstances, as a purchaser for the benefit of the *cestui que use*. In some cases a trustee will be protected in his purchase at his own sale, as if the *cestui que trust* be of full age and under no disability, and with a full knowledge of the transaction, lies by for an unreasonable time, or being under age, or other disability, does not, in a reasonable time after coming of age, or the disability is removed, seek to set aside the sale or treat the trustee as purchaser, for his benefit, it will be considered as an acquiescence in the sale. It is only in favor of the party interested that such a sale will be vacated in chancery—a court of law is not the proper tribunal to set it aside, merely on the ground that the trustee was purchaser at his own sale.—An administrator must comply with an order of the orphans court directing a sale of the personal property of the deceased, for the payment of debts. He cannot retain property at its appraised value by paying debts, out of his own funds, to the amount of the appraisement. Where an administrator retained a part of the personal estate of the deceased at the appraised value, and sold a part for the benefit of the estate, and a part as his own property, he must account for the increase of the slaves, and for the use and hire of all slaves retained or hired by him; and where one of the slaves had run away, he must account for such slave, unless he used reasonable endeavours to regain him. He is to be allowed for money expended in clothing and maintaining such slaves as were unable to work, and in bringing up and clothing the increase of slaves, so long as they continued a charge; also for all debts paid, his commission and all legal costs. He is to be charged with the amount of the inventory, with the sum gained on the sales of the property, and with the debts received. *Hall vs. Griffith*, 2 *Har. & John.* 483. *Haslet vs. Glenn.* 7 *Har. & John.* 17.

A plaintiff, who in consequence of the delinquency of the administrator, in not settling up and distributing the estate in a reasonable time, charges him in a suit on the administration bond, with the appraised value of the property, can only recover it with interest thereon. If the *distributee elect* to claim the hire or the earnings of the negroes, he must allege as a part of the gravamen of his action, not the non-payment of their appraised value, but the non-delivery of their real value. *Burch & Mundell vs. State.* 4 *Gill & John.* 450.

Upon an order for sale, upon a credit bearing interest, the executor or administrator, may receive immediately the purchase money. *Gwynn vs. Dorsey*, 4 *Gill & John.* 461.

If he is directed to sell at public sale on credit bearing interest, and sells at private sale for cash, he is to be charged with the difference between a credit and a cash price. 5 *Mum.* 183. If the sale is not fair, but collusive, to enable a party interested to buy at a less than a fair price, the executor or

administrator is responsible. 2 *Tucker's Com.* 406. *Tol. Ex.* 427. So if the widow, or any of the representatives is suffered to take articles at their appraised price, which is less than their value.—*Id.*

4. The said court shall have power to direct a sale as aforesaid, in case it shall deem a sale advantageous for the persons interested in the administration, either *ex officio*, or on application of any of the said persons.—1798, *ch.* 101, *sub ch.* 8. Court may order sale.

5. Executors and administrators shall have full power and authority to commence and prosecute any personal action whatever, at law, or in equity, (as the case may require,) which the testator or intestate might have commenced and prosecuted, except actions of slander, and for injuries or torts done to the person; and they shall also be liable to be sued in any court of law or equity, (as the case may require,) in any action (except as aforesaid,) which might have been maintained against the deceased; and they shall be entitled to, or be answerable for costs, in the same manner as the deceased would have been, and they shall be allowed for the same in their accounts, provided the court awarding costs against them shall certify, that there were probable grounds for instituting, prosecuting or defending, the action on which a judgment or decree shall have been given against them.—*Id.* Suits sustained against executors or administrators. Costs of suit.

6. In no action against an executor or administrator shall he be compelled to put in special bail.—*Id.* Special bail not to be required of executor or administrator.

10. It shall be the duty of all executors and administrators to pay all just claims against the deceased, exhibited to them, or a just proportionable part thereof, according to the assets; and if any claim be known to the executor or administrator, (although the same be not exhibited,) he shall retain the same, or a just proportionable part, for the benefit of the creditors, provided he can satisfy the court, that such claim is just, or may probably be recovered; and when it is certain that there is a claim of a person out of the state, but the amount thereof cannot be ascertained, the court may allow such sum as it shall think proper to be retained, to be accounted for, nevertheless, if within three years after the death of the deceased no demand shall be made by the creditor, or his legal representative, and suit thereon brought on the rejection thereof by the executor or administrator, and from the time of making payment to, or a dividend amongst, the creditors, as hereafter directed, all interest on such claim, or proportionable part, shall cease; provided, that the executor or administrator shall pay, or tender the same, together with such further part as shall be due on further money coming into hand, to the creditor, on demand; and in case the executor or administrator, on demand of a greater sum made by such creditor, shall tender the principal and interest which were due at the time of such dividend, or the just proportionable part, together with such further proportion as aforesaid of assets, and the claimant shall notwithstanding bring suit, the said executor or administrator, at any time before judgment, may bring into court the money so tendered, or money to an equal amount, and if he shall satisfy the court, that the said sum was really the Distribution among creditors. Executor to retain for 3 years, &c. No interest to be allowed on such claim, after &c.

amount of the principal and interest due at the time of such dividend, or of the proportionable part to which the claimant was entitled at the dividend, together with such further proportion (if any there arose,) the court shall thereupon give judgment, that the sum so brought in, deducting the costs sustained by the defendant, be paid to the plaintiff, and the said judgment shall be pleadable in bar to any action afterwards brought to recover the said debt; or, in case the executor or administrator shall not tender as aforesaid before the suit brought, the creditor shall recover no more than the proportionable part due at the time of the dividend, and such further proportion as he was entitled to on the coming in of further assets, with interest on each to the time of judgment.—*Id.*

Executor or administrator may retain for suits brought against them.

11. And if any action be commenced or prosecuted against an executor or administrator, for the recovery of larger debt or damages than the said executor or administrator shall think due, so that the same cannot be ascertained before verdict, the executor or administrator shall be allowed to retain such sum to meet the said debt or damages as the orphans court shall allow, and if more than enough be allowed, the party shall afterwards account for it, but nothing shall be retained on account of such further debt or damages, where the court shall be satisfied that there will be money sufficient coming in after such dividend to meet the said damages, or a just proportion thereof, regard being had to other claims.—*Id.*

Arbitrators may be appointed by the court.

12. The orphans court shall have power, with the consent of both parties, to be entered on their proceedings, to arbitrate between a claimant and an executor or administrator, or the dispute may, by the parties, be referred to any person or persons approved by the orphans court.—*Id.* *See ante page* 26, *sec.* 2.

Advertisement by an executor or administrator.

13. No executor or administrator, who shall, after the lapse of one year from the date of his letters, have paid away assets to the discharge of just claims, shall be answerable for any claim, of which he had no notice or knowledge; *provided*, that at least six months before he shall make distribution, he shall have caused to be inserted in such and so many newspapers as the orphans court may direct, an advertisement, as follows, or fully to the following effect, viz: 'This is to give notice, that the subscriber (or subscribers) of ——, hath (or have) obtained from the orphans court of —— county in Maryland, letters testamentary (or of administration) on the personal estate of —— ——, late of —— deceased; all persons having claims against the said deceased are hereby warned to exhibit the same, with the vouchers thereof, to the subscriber, at or before the —— day of —— next, they may otherwise by law be excluded from all benefit of the said estate. Given under my hand this —— day of ——.'

It has been frequently ruled in the courts of the first judicial district, that a publication of this notice in a newspaper, creates no protection for the administrator, unless the newspaper has been previously designated by the order of the orphans court.

14. It shall be the duty of an executor or administrator, within thirteen calendar months after the date of his letters, or within such further time, not exceeding four months longer, as shall be allowed by the orphans court, on his making oath (or affirmation) as aforesaid respecting the insufficiency of the personal estate to discharge all just claims known to him, or pay each claimant his just proportion of the money then in his hands, (retaining as before directed;) it shall likewise be his duty, once in every term of six months, after the first distribution, to make distribution of the money which hath since come into his hands, until he shall have fully administered, and on failure his administration bond may be put in suit.—*Id.* Time for rendering an account and making distribution.

An administrator is bound to pay interest, from the end of thirteen months after the date of his letters of administration, if he kept it by him without apparent reason, and omits to distribute it among the creditors. *Gwynn vs. Dorsey*, 1 *Gill & John.* 453.

15. In case all the assets shall have been paid away, or delivered, or distributed in the manner hereafter directed, and a claim shall afterwards be exhibited, of which the executor or administrator hath not knowledge or notice, he shall not be answerable for the same; and if he be sued for any claim, and shall make it appear to the court in which suit is brought, that he hath so paid away, delivered or distributed, and the plaintiff cannot prove that the defendant had knowledge or notice as aforesaid before such payment, delivery or distribution, the court shall not proceed to give judgment; (although the amount of the claim against the deceased may be ascertained as herein before directed,) until the plaintiff shall be able to shew further assets coming into the defendant's hands, but if the plaintiff shall prove notice, or knowledge of the said claim, against the defendant, judgment may immediately be given for such sum as the plaintiff ought to have received at the dividend, and fieri facias may issue and have effect, and further judgment may be given, as herein before directed on coming in of further assets.—*Id.* After distribution an executor or administrator not answerable for claims he had no notice of.

16. In all cases where an executor or administrator is to make a payment of distribution amongst creditors, he may give notice, three weeks successively, in some convenient newspaper, of the time and place for making it, and in case any creditor shall not attend in person, or by agent or attorney, to receive the amount or proportionable part of the claim, all interest on such claim or proportionable part shall cease from that time; provided, that the executor or administrator shall, at any time thereafter, on demand, pay the said claim, or proportionable part, to the party, his agent or attorney duly authorized; and whenever the executor or administrator shall proceed to make an additional payment or dividend, he may advertise as aforesaid, and interest shall stop as aforesaid; and if at any additional dividend a just claim established as hereafter directed shall be exhibited, the creditor shall be entitled to such sum as will place him on an equal footing with those who have already received a dividend.—*Id.* Advertisement of distribution among creditors.

17. In paying the debts of the deceased, an executor or administrator shall observe the following rules: Judgments and

Judgments preferred to other claims

decrees against the deceased shall be wholly discharged before any part of other claims; after such judgments and decrees shall be satisfied, all other just claims shall be admitted to a distribution, on an equal footing, without priority or preference; if there be not sufficient to discharge all such judgments and decrees, a proportionable division or dividend shall be made between the judgment and decree creditors, but no executor or administrator shall be bound to discover what judgment or decrees have been passed against the deceased, unless in the high court of chancery, or the general court of the shore, or the court of the county, where the deceased last resided.—*Id.*—*Vide next sec.*

The common law secures to the state the right to have its debts first paid out of the property of its debtor, remaining in his hands, and no lien standing in the way. *State of Maryland vs. Bank of Maryland*, 6 *Gill & John.* 206.

An executor or administrator takes the funds of the deceased to distribute according to law, subject to such preference as the law allows. The moment the debtor dies, the law asserts the rights of the creditors, and takes the property into its hands, and makes and directs the distribution of it according to their priority. That being the law of a deceased person's estate, the testator cannot change it by his will.—*Id.*

Where the state and an individual have judgment against a deceased person, in the payment of debts by the executor, the state has a preference and the debt due to the state is first to be paid. *Contee vs. Chew's Ex.* 1 *Har. & John.* 417.

By the act of Congress, 3d March, 1798, and 2d March, 1799, the United States have priority in payment of debts due from a deceased debtor. 2 *Cranch*, 389, 390. 6 *Peters*, 30, 35.

A judgment of a sister state does not rank in the payment of debts by the administrator of the deceased debtor, as a judgment of our own state, and therefore has no preference over simple contract debts. *Brengle vs. Mc Clellan*, 7 *Gill & John.* 434.

If an executor compounds the debts due from the estate, for a sum less than what is due, the estate shall have the benefit of the composition. *Turner vs. Bouchel*, 3 *Har. & John.* 106.

Executor, &c. not bound to take notice of judgment against deceased, &c.

8. *And*, whereas compelling an executor or administrator to take notice of all judgments and decrees against the deceased is productive of great inconvenience, as well to the executor or administrator as to the other creditors, inasmuch as he cannot with safety, pay off other debts, though the said judgments or decrees may be fully discharged, unless such executor or administrator is in possession of the receipt or other legal evidence of the payment; and it appearing proper that such creditors, as to the manner and time of producing their claims, should be placed in the same situation as others: therefore, *Be it enacted*, That an executor or administrator shall not be bound to take notice of or discover any judgment or decree against his or her deceased, but such judgment or decree creditor shall exhibit his claim in the same manner as other creditors, and in case the same shall not be exhibited, such claim shall be barred in the same manner as if it rested on bond or simple contract: *provided*, that nothing herein contained shall extend, or be construed to extend, to deprive such creditor of the preference given by the original act, in cases where the claim is in due time exhibited.—1802, *ch.* 101.

Proviso.

18. If a claim be exhibited against an executor or administrator, which he shall think it his duty to dispute or reject, he may retain in his hands assets proportioned to the amount of the

claim, which assets shall be liable to other claims, or be delivered up or distributed as hereafter mentioned, in case the claim be not established; and if on any claims exhibited and disputed as aforesaid, the creditor or claimant shall not, within nine months after such dispute or rejection, commence a suit for recovery, the said creditor or claimant shall be for ever barred; and the executor or administrator may plead this act in bar, together with the general issue, or other plea proper to bring the merits of the cause to trial; and, on any dividend to be made nine months after such dispute or rejection, and failure to bring suit, the executor or administrator may proceed to pay, or distribute, as if he had not knowledge or notice of such claim, or as if it did not exist, but if the claim be put in suit within the nine months, it may be ascertained by verdict or otherwise, and the court shall proceed as herein before directed, regard being had to the rules herein before laid down as to the notice to be given by the executor or administrator, and the distribution or payment to be made after such notice.—1789, *ch.* 101, *sub ch.* 8.

Executor or administrator may retain for a disputed claim, and if suit is not brought on it for nine months it is barred.

19. In no case shall an executor or administrator be allowed to retain for his own claim against the deceased, unless the same be passed by the orphans court, and every such claim shall stand on equal footing with other claims of the same nature.—*Id.*

Executor or administrator's claim on the same footing with others.

By this section a full power is given to the orphans court to allow an account of an executor or administrator against the deceased, as if a like claim had been preferred by any other person, and if such an account has been credited by the orphans court to the executor, in the settlement of his account, the burthen of establishing its injustice is thrown upon the party excepting to it. *Owen vs. Collinson,* 3 *Gill & John.* 39.

20. The bare naming of an executor in a will, shall not operate to extinguish any just claim which the deceased had against him, but it shall be the duty of every such executor, accepting the trust, to give in such claim in the list of debts; and on his failure to give in such claim, or any part thereof, any person interested in the administration may allege the same, by petition to the orphans court granting the administration, and the said court, with consent of the parties, may decide on the same, or it may be referred by the parties, with the court's approbation, or, at the instance of either party, the court may direct an issue or issues to be tried, and the same shall be tried in any court of law proper for the trial, and most convenient under all circumstances; and the court of law shall have power to direct the jury, and grant a new trial, as if the issue or issues were in a suit therein instituted, and a certificate from such court, or any judge thereof, of the verdict or finding of the jury, under the seal thereof, shall be admitted by the orphans court to establish or destroy the claim, or any part thereof; and if the executor shall give in such claim, or the same, or any part, be established as aforesaid, he shall account for the sum due in the same manner as if it were so much money in his hands, and on failure his bond may be put in suit.—*Id.*

Executor or administrator owing deceased, bound to account for the same.

21. In like manner it shall be the duty of every administrator to give in a claim against himself, and on giving it, or failure to

Administrator bound to do likewise.

give it in, there shall be the same proceedings in every respect as are herein prescribed with regard to an executor.—*Id.*

No claims to be paid unless passed or proved.

22. No executor or administrator shall discharge any claim against the deceased, (otherwise than at his own risk,) unless the same be first passed by the orphans court granting the administration, or unless the said claim be proved according to the following rules.—*Id.*

If an executor or administrator, bona fide, without any knowledge of its injustice, pay a claim thus passed or proved, the payment is not at his risk. His right to a credit for it cannot be controverted. *Owens vs. Collinson,* 3 *Gill & John.* 39.

Executor, &c. may within one year return a list of the debts due, &c.

7. *And be it enacted*, That every executor or administrator heretofore appointed, may in his, her, or their discretion, within one year after the passage of this act, and every executor and administrator hereafter appointed may, within one year after the date of his, her or their letters, return to the orphans court a list of the debts due from his, her, or their testator or intestate, which may be made known to him, her, or them, stating the principal and the time at which interest is to commence on each respective debt, to which list of debts shall be annexed the oath or affirmation of the executor or administrator, that the same is a correct list of the debts due from his, her, or their testator or intestate, so far as the said debts have come to his, her, or their knowledge, and every six months thereafter, until the estate may be finally settled, a similar return may be made of such debts as shall come to the knowledge of the executor or administrator within that period, which returns or list of debts shall be recorded by the register of wills, and a copy thereof, certified under the hand of the register, and the seal of his office, shall be *prima facie* evidence of the amount of debts due by the intestate or testator in any court where the executor or administrator alleges or contends that he, she or they have not assets sufficient to discharge the claim in controversy, or any part thereof.—1820, *ch.* 174.

List returned not to afford evidence as to the justice of any debt, &c.

8. *And be it enacted*, That the list of debts to be returned as aforesaid shall not afford any evidence as to the justice or correctness of any debt therein stated, whenever the same shall be controverted by an executor or administrator, in any suit instituted for the recovery of such debt, nor shall the same be construed to take any debt out of the operation of the acts of limitation.—*Id.*

A further and additional supplement to the act, entitled, an act for the recovering of Small Debts out of court, and to repeal the act of assembly therein mentioned.—1819, *ch.* 167.

Justice to exercise jurisdiction in cases where executor, &c. are plaintiff or defendants.

1. *Be it enacted by the General Assembly of Maryland*, That from and after the passage of this act, it shall and may be lawful for any justice of the peace to exercise jurisdiction (in all cases where he can now exercise jurisdiction,) over small debts, wherein either executors or administrators shall be plaintiffs, or executors or administrators shall be defendants, except that it shall not be lawful for any justice of the peace to issue a warrant against any executor or executors, administrator or administrators, within twelve months after letters testamentary or letters of administration shall have been granted.

2. *And be it enacted*, That if any executor or administrator shall allege, in writing, and shall verify the said allegation by oath or affirmation, that he has no assets belonging to his testator or intestate in his hands, or that he has reasonable cause to believe that the assets in his hands will not be sufficient, in a due course of distribution to pay the debts of the deceased, then and in that case it shall be the duty of the justice of the peace to transmit the proceedings in relation thereto to the next county court of the county in which such justice shall reside, and the said court shall proceed to give judgment thereon, according to the law of the land, and the right and equity of the case. If they shall allege on oath, that they have no assets, proceedings to be returned to county court.

3. *And be it enacted*, That all executors and administrators may supersede and stay execution, issued against the goods and chattels, rights and credits, of their testators or intestates respectively, in the same manner as if the said executions had issued against them in their own right, according to the provisions of the act to which this a supplement; and the form of the supersedeas to be used in such case shall be as nearly similar to the form prescribed in the said act as the circumstances of the case will admit; *provided*, *always*, that such supersedeas shall render the executors or administrators so superseding, liable to be proceeded against on the said supersedeas, in the same manner as if the debt so superseded had been his, her, or their own personal debt.—1820, *ch.* 80. Executors, &c. may supersede and stay execution. Proviso.

2. *And be it enacted*, That in all cases where a claim or claims against a deceased person's estate, shall be known to the executor or administrator of such estate, and such claimant or claimants shall delay, neglect, or refuse to bring in his, her or their claim or claims legally authenticated, after notice given as directed in the thirteenth section of the eighth chapter of the act to which this is an additional supplement, and within the time limited in such notice, such claimant or claimants shall be in the same situation to all intents and purposes with regard to his, her or their claims, as those whose claims are unknown to the executor or administrator, any thing contained in the act to which this is an additional supplement to the contrary notwithstanding. 1823, *ch.* 131. Claimants neglecting.

AN ACT to extend to executors and administrators the privilege of appeal from judgments rendered by justices of the peace, against their testators or intestates.—1834, *ch.* 105.

SEC. 1. *Be it enacted by the General Assembly of Maryland*, That from and after the passage of this act, the privilege of appeal from any judgment, rendered by any justice of the peace, as is now allowed by law to any person who may think him or herself aggrieved by the judgment of any justice of the peace, shall be, and the same is hereby extended to all and every executor or executors, administrator or administrators, of any deceased defendant, against whom in his life-time, any judgment or judgments may have been rendered by any justice of the peace as aforesaid. Right of appeal extended.

SEC. 2. *And be it enacted*, That any and every executor or executors, administrator or administrators, who shall apply for an appeal as aforesaid, shall produce to the justice of the peace, Method directed.

authorized and required to grant the appeal as aforesaid, satisfactory evidence of his or her being executor or executrix, administrator or administratrix, and the said justice shall proceed to take bond and security from the executor or executrix, administrator or administratrix as aforesaid, and to grant the appeal within the same time, and subject to the same provisions, as are now prescribed by law, in cases of appeal from judgments or justices of the peace.

CHAPTER XXXII.

RULES FOR PROVING CLAIMS AGAINST A DECEASED PERSON.

Rules for authenticating or proving claims against a deceased person.

1. The voucher or proof of a judgment or decree shall be a short copy thereof, under seal, attested by the clerk or register of the court, where it was obtained, who shall certify, that there is no entry or proceeding in the court, to shew that the said judgment (or decree) hath been satisfied; there shall likewise be a certificate of some person authorized to administer an oath endorsed on, or annexed to, a statement of the debt due on such judgment or decree, that the creditor, since the death of the deceased, hath taken before him the following oath, or affirmation, viz: 'That he (or she) hath not received any part of the sum for which the judgment or decree was passed, except such part (if any) as is credited;' and if the creditor on the judgment or decree be an assignee of the person who obtained it, the oath, or affirmation, shall go on, and say further, 'and that, to the best of his (or her) knowledge or belief, no other person hath received any parcel of the said sum, except such part (if any) as is credited,' and an assignee shall also produce the assignment, under the hand of the assignor; and if there hath been more than one assignment, each assignment shall be produced under the hand of the party.—1798, *ch.* 101, *sub ch.* 9.

Judgments.

Special bail.

2. If a special bail shall have discharged a judgment against the deceased, he shall be considered as the judgment creditor, and in case the plaintiff who obtained the judgment shall not have assigned the same (as he ought to do) to the bail, a receipt from him, given to the bail, shall be considered as equivalent to an assignment.—*Id.*

3. If there be more than one creditor, the whole oath or affirmation aforesaid, with the other vouchers, shall be sufficient.—*Id.*

Bond, note, specialty.

4. In case of a specialty, bond, note, or protested bill of exchange, the vouchers shall be the instrument of writing itself, or a proved copy, in case it be lost, with a certificate of the oath or affirmation made as aforesaid, since the death, and endorsed on, or annexed to, the instrument or a statement of the claim, 'that no part of the money intended to be secured by such instrument hath been received, or any security or satisfaction given to the same, except what (if any) is credited.—*Id.*

Assignee.

5. And if the creditor on such instrument be an assignee, there shall be the same oath, (or affirmation,) of the original cre-

ditor, with respect to the time of the assignment; and in case of successive assignees, there shall be the same oath, or affirmation, taken by each, with respect to the time of each respective assignment.—*Id.*

6. In case of a bill of exchange, the protest, and other things which would be required (if the deceased were alive,) shall be necessary to justify an executor or administrator in making payment or distribution.—*Id.* Bill of exchange.

7. If the claim be for rent, there shall be produced the lease itself, or the deposition of some credible witness or witnesses, or an acknowledgment in writing of the deceased, establishing the contract, and the time which hath elapsed during which rent was chargeable, and a statement of the sum due for such rent, with an oath or affirmation of the creditor thereon endorsed, 'that no part of the sum due for the said rent, or any security or satisfaction for the same, hath been received, except what (if any) is credited;' and if the creditor be an assignee, there shall be such oath or affirmation) of the original creditor, with respect to the time of assignment.—*Id.* Claim for rent.

8. The vouchers or proofs of any claim on open account shall be a certificate of an oath or affirmation taken by the creditor as aforesaid, since the death, endorsed on, or annexed to, the account, 'that the account as stated is just and true, and that he (or she) hath not received any part of the money stated to be due, or any security or satisfaction for the same, except what (if any) is credited;' and moreover the account shall appear to have been proved as is required by an act passed at November session, one thousand seven hundred and eighty-five, chapter forty-six.—*Id.* Open account.

9 Provided nevertheless, that it shall not be considered as the duty of an executor or administrator to avail himself of the act of limitation to bar what he supposes to be a just claim, but the same shall be left to his honesty and discretion.—*Id.* Limitation.

10. If the claim arises on a bond, note, or a bill of exchange, or account for dealing with a factor, and the principal be not within the state, the factor who took the said bond, or note, or bill, or who sold or delivered the articles in the account, may make oath or affirmation, to be certified as aforesaid, and endorsed on a statement of the money thereon due, 'that the said statement is full, just and true, and that he (the deponent) took the said bond, (or note, or bill, or delivered the articles charged in the account,) as factor to —— ——, living in (or lately of) ——; that neither he (the deponent) nor the principal, nor any other person for him, or the principal to his knowledge or belief, hath received any part of the money originally due on such bond, note, bill or account, or any security or satisfaction for the same, except what (if any) is credited;' and the said oath, or affirmation, with the other respective vouchers and proofs aforesaid, shall authorize the executor or administrator in making payment or distribution.—*Id.* Factor.

11. If the factor aforesaid be dead, or out of the state, and the principal be also out of the state, and it shall appear, (in case of account) that the same have been regularly proved according to

If the factor be dead or out of the state.

the act of 1785 aforesaid, an oath (or affirmation,) of any other factor, made after the death of the testator or intestate, and certified and endorsed on the statement as aforesaid, 'that the said bond, note, bill or account, came into his hands as factor for the creditor, residing in ——, after the death (or removal) of —— ——, the factor who took the said bond, (or note, or bill, or delivered the articles in the account;) that he hath reason to believe, and does believe, that the said statement is full, just and true, and that no part of the money originally due on such bond (note, bill or account,) or any security or satisfaction for the same, hath been received, except what (if any) is credited;' and the said oath, or affirmation, with the other respective vouchers or proofs, as aforesaid, shall be sufficient to authorize the executors as aforesaid.—*Id.*

Claims out of the state, how to be proved.

12. When any affidavit or depositions to prove claims shall have been taken out of the state, the same shall be good, if taken and certified as aforesaid by the notary of the place, or by some person there authorized to administer an oath, and certified to be such under the seal of the governor, and mayor or chief magistrate, or clerk of any court of record, or notary public of such place, and the said oath, affirmation or deposition, shall be as available as if taken before a justice within the state.— *Id.*

Order by register or court not to be valid, but may be contested.

9. *And be it enacted*, That in no case shall the order made by the orphans court, or by the register of wills, that an account or claim will pass when paid, be deemed of validity to establish such account or claim, but in case the executor or administrator thinks fit to contest the same, such account or claim shall derive no validity from the order aforesaid, but shall be proved in the same manner as if no such order had been made.—1802, *ch.* 101.

How account of executor or administrator must be proved.

14. If the creditor be an executor or administrator, the claim shall not be received, although vouched or approved as aforesaid, unless he make oath or affirmation, to be certified as aforesaid, 'that it does not appear from any book or writing of his testator, (or intestate,) that any part of the said claim hath been discharged, except what (if any) is credited, and that, to the best of the deponent's knowledge and belief, no part of the said claim hath been discharged, and no security or satisfaction hath been given for the same, except what (if any) is credited.'—1798, *ch.* 101, *sub ch.* 9.

Claims must be passed.

15. No executor or administrator shall be allowed in his account for any claim by him discharged, unless he produce the claim, passed by the orphans court, or proofs or vouchers as aforesaid.—*Id.*

CHAPTER XXXIII.

DIRECTIONS CONCERNING ACCOUNTS AND DEBTS DUE TO DECEASED PERSONS.

Executors and administrators are not to be allowed for articles furnished the family within twelve months after the deceased's death. *Scott vs. Dorsey*, 1 *Har. & John.* 232. They are to be allowed for finishing the crop. *Ibid.* In finishing the growing crops of the deceased, an executor or administrator is not bound to discharge the duties of an overseer. He may employ and pay out of the funds of the estate, as many overseers as are necessary for the completion and preservation of the crop. If with more advantage to the estate, he acts in the capacity of an overseer himself, it is competent for the orphans court to allow him a reasonable compensation for his services. *Lee vs. Lee and Welsh*, 6 *Gill & John.* 309. Are to be allowed for funeral expenses; for the amount of all judgments against them; for the widow's thirds, whether paid or not; for all specific legacies, and the appraisement is to be taken as conclusive; not to be allowed interest on debts paid by them, (if they had assets) after the testator *had been dead more than twelve months. Scott vs. Dorsey*, 1 *Har. & John.* 234. It may be questioned if the courts would sustain now, this opinion of the general court, it would seem upon principle, that the administrator's liability for interest, commences thirteen months after administration. *Gwynn vs. Dorsey*, 4 *Gill & John.* 453.

The orphans court have a limited discretion as to the commission to be allowed the executor or administrator, which cannot be the subject of review in a superior court, and which may be allowed at any time during the progress of the settlement, made by the administrator with the orphans court. Vide ante page 17. An administrator who employs an agent to collect money due the estate, no resort being had to legal process, and the agent being neither a public officer nor attorney, is not entitled to charge the estate with the compensation to the agent. *Gwynn vs. Dorsey*, 4 *Gill & John.* 453.

One administrator is not entitled to a greater part of the commission under the assumed principle that he has bestowed more labour in the settlement of the estate than the other. *Richardson vs. Stansbury*, 4 *Har. & John.* 275.

An executor is entitled to commission on the excess of the sales over the appraisement, upon whatever are assets. *Evans vs. Iglehart*, 6 *Gill & John.* 171.

5. If any thing be bequeathed to an executor, by way of compensation, no allowance of commission shall be made, unless the said compensation shall appear to the court to be insufficient, and if so, it shall be reckoned in the commission to be allowed by the court.—1798, *ch.* 101, *sub. ch.* 14. Commission given to executor by will.

Executors and administrators may claim an allowance for sums of money necessarily expended by them in clothing, and maintaining the slaves of the estate unable to work and maintain themselves, and similar allowance may be made to them in relation to slaves able enough to work and maintain themselves. *Evans vs. Iglehart*, 6 *Gill & John.* 171.

3. If the first account, to be returned as aforesaid, shall not shew the estate which was on hand to be fully administered, another account shall be returned within six months thereafter, and within every term of six months thereafter an account shall be returned, until the estate shall appear to be fully administered; and whenever a discovery or receipt of assets shall take place, after rendering an account, another account shall be rendered within six months thereafter; *provided* nevertheless, that an executor or administrator shall not be obliged to render accounts, Administrator's account to be returned every six months after the first.

when it appears to the court that the estate has been fully administered, except debts which the court shall set down and deem as desperate, unless the same shall afterwards be recovered. 1798, *ch.* 101, *sub ch.* 10.

Suits to be brought for sperate debts within six months.

4. The court shall examine every list of debts returned by an executor or administrator with the inventory, and for every debt which the court shall not mark as desperate, or improper to be put in suit, the executor or administrator shall commence a suit, unless the debts be paid within six months thereafter, or unless the debtor be out of the state, or unless the court shall think reasonable an excuse made within one month after the lapse of the said six months for not bringing suit; and on failure to bring suit as aforesaid, the party shall be liable to a suit on his administration bond, and to such damages as shall be found by the jury.—*Id.*

Not answerable for sperate debts.

5. It is not the intent of this act that an executor or administrator be answerable, at all events, for a debt which he shall return sperate, but merely to enable the court, and all parties concerned, to form a just estimate of the circumstances of the deceased.—*Id.*

Distribute among devisees and relations.

6. When it shall appear by the first, or other account of an executor or an administrator with the will annexed, that all the claims against, or debts of, the deceased, which have been known by or notified to the said executor or administrator, have been discharged, or retained for, or settled, it shall be his duty to deliver up the estate in his hands to those entitled, provided, that his duty and power with respect to future assets shall not cease; and after such delivery he shall not be liable for any debt afterwards notified to him, *provided* he shall have advertised, as herein before directed, unless assets shall afterwards come into his hands, which shall be answerable for such debts.—*Id.*

Court may order part of the estate to be paid to those entitled, when there is more than sufficient to pay the debts.

7. Whereas it often happens that an executor or administrator hath in his hands assets to a great amount, and there is no reason to apprehend that they will be nearly exhausted in payment of debts, and those entitled after payment of debts are in want of subsistence, or greatly straitened in their circumstances, in case any person so entitled shall apply, by petition, and satisfy the court that he or she is really in want of subsistence, or greatly straitened in circumstances, and that it probably will not require more than one-half of the assets to discharge the debts, the court may direct the executor or administrator to deliver to the petitioner any part of what the court shall suppose will be the petitioner's distributive share, or any part of a legacy or bequest in money, not exceeding one-third part, the said petitioner giving bond, with security, approved by the court, to the executor or administrator, for returning the same, or an equivalent, with interest, whenever so directed by the court; and the court shall have power to determine, in a summary manner, on any such petition, after a summons against such executor or administrator duly returned either summoned or *non est.*—*Id.*

Same as to specific legacies.

8. And the court, in like manner, on any petition by a person in such circumstances, to whom a specific legacy or bequest hath been made, being satisfied that the assets, exclusive of all spe-

cific legacies, will not nearly be exhausted by debts, may direct the executor or administrator to deliver to the petitioner, the said specific legacy or bequest, on his or her giving bond as aforesaid.—*Id.*

An executor or administrator failing to return an account, his letters may be revoked.

9. If an executor or administrator shall fail to return an account as herein before directed within the time limited by law, or by the court, his letters, on application of any person interested, may be revoked, and such administration (as the case may require,) may be granted at discretion of the court; and the administrator, to whom letters shall be granted, shall be entitled to put the delinquents's bond in suit, and to recover such damages thereon as the jury may find; and in assessing such damage it shall be the duty of the jury to allow such sum as will be equal to six *per cent. per annum*, on the amount of the inventory or inventories from the time of the return or returns to the time of the verdict, over and beyond the damages, for such loss or injury as the estate may have sustained by the delinquent's conduct.—*Id.*

After settlement of accounts to deliver up.

10. Whenever it shall appear by the first or other account of an administrator, that all the debts of, or claims against, the estate, known by or notified to him, have been discharged or allowed for in his account, it shall be his duty to deliver up and distribute the surplus and residue of the estate as hereafter directed, provided that his power and duty, with respect to future assets, shall not cease; and after such delivery, the administrator shall not be answerable for any debt afterwards notified to him, provided he shall have advertised as herein before directed, unless assets shall afterwards come into his hands which shall be liable for such debts.—*Id.*

Executor or administrator to retain for a contingency under direction of court, &c.

11. If by the provisions in a will it shall be necessary for an executor or for an administrator with a copy of the will annexed, to retain in his hands the personal estate, or a part thereof, after all just claims are discharged, as where money, or some other thing is directed to be paid at a distant period, or upon a contingency, the court of chancery or the orphans court shall have power, on the application of such executor or administrator, or of a party interested, to decree or give directions relative thereto; and it shall be the duty of such executor or administrator, to apply to the court of chancery or the orphans court, and the said courts respectively shall have full power to decree or direct what part of the personal estate shall be retained or appropriated for the purpose, and in what manner it shall be disposed of, and the legacy or benefit intended by the will shall be secured for the person to be entitled at a future period, or contingency, and how the necessary part of the personal estate, to be appropriated for the purpose, shall be prevented from lying dead, or being unproductive, and how it shall be applied, agreeably to the intent of the will, or the construction of law, in case the contingency shall not take place.—*Id.*

CHAPTER XXXIV.

DISTRIBUTION OF AN INTESTATE'S PERSONAL ESTATE.

Distribution of an intestate's personal property.

When all the debts of an estate, exhibited and proved, or notified and not barred, shall have been discharged, or settled and allowed to be retained, as herein directed, the administrator shall proceed to make distribution of the surplus as follows: 1798, *ch.* 101, *sub ch.* 11.

Widow only.

1. If the intestate leave a widow, and no child, parent, grandchild, brother or sister, or the child of a brother or sister of the said intestate, the said widow shall be entitled to the whole.—*Id.*

Widow and children.

2. If there be a widow, and a child or children, or a descendant or descendants from a child, the widow shall have one-third only.—*Id.*

Widow, father and mother, brother or sister.

3. If there be a widow, and no child, or descendants of the intestate, but the said intestate shall leave a father, or mother, or brother or sister, or child of a brother or sister, the widow shall have one-half.—*Id.*

Surplus.

4. The surplus exclusive of the widow's share, or the whole surplus, (if there be no widow,) shall go as follows.—*Id.*

Children only.

5. If there be children, and no other descendant, the surplus shall be divided equally amongst them.—*Id.*

Children and descendants only.

6. If there be a child or children, and a child or children of a deceased child, the child or children of such deceased child shall take such share as his, her or their deceased parent, would (if alive) be entitled to; and every other descendant or other descendants, in existence at the death of the intestate, shall stand in the place of his, her or their deceased ancestor; *provided*, that if any child, or descendant, shall have been advanced by the intestate, by settlement or portion, the same shall be reckoned in the surplus, and if it be equal, or superior to a share, such child or descendant shall be excluded, but the widow shall have no advantage by bringing such advancement into reckoning; and maintenance, or education, or money given without a view to a portion or settlement in life, shall not be deemed advancement; and in all cases those in equal degree, claiming in the place of an ancestor, shall take equal shares.—*Id.*

2 Harr & J. 114

Father only

7. If there be a father, and no child or descendant, the father shall have the whole.—*Id.*

Brother and sister only.

8. If there be a brother or sister, or child or descendant of a brother or sister, and no child, descendant, or father of the intestate, the said brother, sister or child, or descendant of a brother or sister, shall have the whole.—*Id.*

Brother and sister equal.

9. Every brother and sister of the intestate shall be entitled to an equal share, and the child or children of a brother or sister of the intestate shall stand in the place of such brother or sister.—*Id.*

On a question of distribution, the court of appeals decreed, that the personal estate of Benjamin Harwood, who died intestate, should be distributed to the children of his sister, and the children of each of his brothers, who died before the intestate, in such shares, to which such sister or brother, if he

or she had survived the intestate, and to the exclusion of any grand-child of such sister or brother of the intestate, and who died before the intestate; and that the share to which the brother of the intestate, who survived the intestate, but died before the distribution took place, be paid over to his executor and administrator, and not to his children. (An intestate died without descendants—a sister, and the children, and grand-children of several deceased brothers and sisters surviving him; of one of the brothers, no child was alive at the death of the intestate, but several of the grand-children of that brother was then living, the plaintiff being one. *Held*, that he was not entitled to any part of the intestate's personal estate.) *Duvall vs. Harwood*, 1 *Har. & Gill*, 474.

Mother.

10. If the intestate leave a mother, and no child, descendant, father, brother, sister or child, or descendant of a brother, or sister, the mother shall be entitled to the whole, and in case there be no father, a mother shall have an equal share with the brothers and sisters of the deceased, and their children and descendants.—1798, *ch.* 101, *sub ch.* 11.

Collateral relations.

11. After children, descendants, father, mother, brothers and sisters, of the deceased, and their descendants, all collateral relations, in equal degree, shall take, and no representation amongst such collaterals shall be allowed; and there shall be no distinction between the whole and half blood.—*Id.*

In the distribution of the personal estate of an intestate, who died leaving a mother and brother of the whole blood, and four brothers and sisters of the half blood, a sister of the half blood is entitled to one-sixth of the distributable estate. The words, that there shall 'be no distinction between the whole and half blood, runs through the whole of this sub chapter. *Seekamp vs. Hammer and wife.* 2 *Harr. & Gill.* 9.

Grandfather and mother.

12. If there be no collaterals, a grandfather may take, and if there be two grandfathers, they shall take alike, and a grandmother, in case of the death of her husband the grandfather, shall take as he might have done.—1798, *ch.* 101, *sub ch.* 11.

13. If any person entitled to distribution shall die before the same be made, his or her share shall go to his or her representatives.—*Id.*

Posthumous children.

14. Posthumous children of intestates shall take in the same manner as if they had been born before the decease of the intestate, but no other posthumous relation shall be considered as entitled to distribution in his or her own right.—*Id.*

5th degree.

15. If there be no relations of the intestate within the fifth degree, which shall be reckoned by counting down from the common ancestor to the more remote, the whole surplus shall belong to the state, to be applied as the legislature shall hereafter direct, saving to the different schools in this state the rights which by existing laws they now respectively possess.—*Id.*

The mode of ascertaining the degree of kindred between two individuals, according to this section, is to reckon by counting down from the common ancestor to the more remote; this applies to all cases of distribution of personal estate. *Charlotte Hall vs. Greenwell.* 4 *Gill & John.* 408.

11. *And*, whereas the personal property of deceased persons, who have died or shall die intestate, without leaving representatives within certain degrees of consanguinity by the acts of seventeen hundred and nineteen, chapter fourteen, and seventeen hundred and twenty-nine, chapter twenty-four, devolved on the free

schools of the county of the deceased, and in most of the counties the free schools having been abolished, the executor or administrator of such deceased persons have retained the property to their own use and benefit: *Be it enacted*, That in all instances where by law the property of deceased persons would have descended or devolved on the free schools of any county, if such free schools had existed, the same shall be, and it is hereby declared to be the property of the college, if any, in such county, or if none, the property of any school to which the public aid by law has been or may be extended, and if none, to go to the county where the property of such person or persons so dying may lie; and that the trustees of the college or school, or the justices of the levy court, respectively, as the case may be, shall have the same right, power and authority, to sue for and recover such property, as the visitors, trustees or governors of any such free school might or could have done; saving to the different schools in this state the rights which by existing laws, they now respectively possess.—1802, *ch.* 101.

Where property would have devolved on free schools, to belong to the college.

XVII. *And be it further enacted, by the authority aforesaid*, That every administrator obliged by the act, entitled, an act for the application of such intestates' estates as leave no legal representative, &c. to pay the balance of the estate to one of the public treasurers, shall hereafter be obliged to pay and satisfy the balance of such estate to the visitors of the public school of the county where the deceased resided, in the same manner as such administrator should have been obliged by law to pay the same to any legal representative in case any such should have appeared, to be applied to the use of such school; save that by the acts now in force, sundry particulars of the goods and chattels are directed to be paid in specie, according to appraisement, to the legal representatives, in this case such administrator shall pay the said balance of such estate in current money, or in specie, at the direction of the visitors.—1729, *ch.* 24.

Administrator to pay the balance, &c.

XX. *Provided nevertheless, and be it enacted, by the authority advice and consent aforesaid*, That in case such residue shall happen to be paid to such visitors as aforesaid, in default of the legal representatives as aforesaid, and that any legal representatives of no remoter degrees amongst collaterals than brothers or sisters children, shall at any time appear, and prove him, her or themselves, to be such legal representatives, that then the visitors that received the residue of such estate, or their successors, if it shall be in their hands, shall restore the same to such legal representative or representatives; and if such residue shall be actually applied to the use and support of the public school, that then the public stock of such school, in the hands of the public treasurers of this province, or either of them, shall be liable to make satisfaction to such representative or representatives, of such residue, and that the said visitors shall give an order to such representative or representatives for the same, on the public treasurers, who shall be obliged, by virtue of this act and such order, to pay the same out of the public stock of such school, if so much in their hands, if not, so much as shall be in their hands, and the residue when they shall receive so much to the use of such school; and

Proviso.

if the administrator shall be obliged to pay any further debt or duties that were due from the deceased, such legal representative receiving the said residue shall refund to such administrator the value of what such administrator shall be obliged to pay as aforesaid, *provided* the same doth not exceed the residue received by such representative, any thing in the said act for the application of such intestate's estates, &c. to the contrary in anywise notwithstanding.—*Id.* Proviso.

An action was brought by the *State, use of trustees of Charlotte Hall school vs. Greenwell*, to recover under the preceding provisions the surplus of an intestate's estate, the statute received no construction from the court, as the case was decided on incidental points, depending on common law principles. 4 *Gill & John.* 409.

In *Thomas, adm. of Bradlee vs. the Visitors of Frederick county school*, 7 *Gill & John.* 369, it is decided that the personal estate of persons dying intestate, without any relations within the fifth degree of consanguinity or affinity, are distributed to the free schools or the schools of the county to which the public aid has been extended in case there should be no college or free school.

The compiler has not been able to find but one case in which persons claiming to be the representatives of an intestate, have sought to recover from a public school, the residuum of an intestate's estate paid over to it, by his administrator under these sections. *Cunningham and others*, filed a bill in the court of chancery, against the *Trustees of Charlotte Hall school*, the complainants state that they are the legal representatives of a certain Mark Kellion, who died intestate, that a certain Greenwell administered on his estate, that after paying the debts and cost of administration, a large surplus remained, that the *Trustees of Charlotte Hall school*, claiming the same under the operation of the preceding sections, instituted an action against the administrator and his securities to recover the amount due and distributable and recovered against the securities a verdict for $1835, upon which judgment was entered,—that the complainants are ignorant what amount of the judgment the trustees received and pray for a disclosure of what they received, and if the judgment is not paid that then the trustees may be compelled to assign the judgment to the complainants, and if paid to the trustees, that they be decreed to pay it over to the complainants. The answer, among other things responds to and admits the judgment, and that they received the *same amounting* to the sum of $1237 81, in full satisfaction of the judgment. The bill does not profess to be framed so as to make the trustees responsible for any improper interposition between the claimants and the administrator and his securities, or charge them with any neglect, to recover more than they may admit to have received, or the full amount of the judgment. Testimony was taken under the commission to prove the complainants to be the legal representatives of the intestate. A copy of the judgment was filed. No testimony appears as to the solvency of the securities against whom judgment was rendered. Upon the final hearing, Bland, chancellor, decreed that the trustees pay to the complainants the full amount of the judgment with interest thereon. An appeal is prayed, and is now pending. No opinion of the chancellor is deposited with the papers.

16. In case the surplus remaining in the administrator's hands after payment of all just debts exhibited and proved, or notified and not barred, or after retaining for the same, shall consist of specific property, or articles mentioned in the inventory or inventories, the administrator, if he cannot satisfy the parties, may apply to the court to make the distribution, and the court may appoint a day for making distribution, and by summons call upon the said parties to appear, and the said court may, at the appointed time, proceed to distribute, but if a majority in point of value shall neglect to appear, or appearing shall object to the distribution of the articles, or if the court shal deem a sale of the Distribution to be made by court.

said articles, or any part of them, more advantageous, a sale shall be directed accordingly, and the rules herein before laid down, relative to a sale by order of the said court, shall be observed.—1798, *ch.* 101, *sub ch.* 11.

Court to appoint two disinterested persons to make distribution of specific articles, &c.

5. *And be it enacted*, That it shall be in the power of the several orphans courts in this state, whenever a distribution of specific articles is to be made, to appoint two disinterested persons, not in any way related to the parties concerned, to make such distribution among the persons entitled, as to them shall seem meet and proper, or if, in their opinion upon a view of such specific articles, no distribution among the persons entitled could be by them made, which should operate equally, but that a sale thereof would be more advantageous to the parties concerned, they shall return to the orphans court their opinion, in writing, and the court shall thereupon order a sale of such articles, upon reasonable notice, and cause the proceeds of such sale to be equally distributed among the parties entitled.—1810, *ch.* 34.

In England, it is the duty of the administrator or executor to collect and speedily reduce into money, the personal assets, when not otherwise directed. Such was never the practice of administrators and executors in this state, and such a course of proceeding is wholly inconsistent with the policy and provisions of our testamentary system of 1798, chap. 101, and with all antecedent legislative enactments upon the subject. So far from its being incumbent upon the executor or administrator to reduce into money the personal assets, to do so, would in most cases, be a manifest violation of duty. They are required to divide specifically, or in other words, in kind, between legatees and distributees, except so far as a sale has been necessary for the security and benefit of the estate, and payment of debts and costs of administration, and where they cannot make a satisfactory distribution, then by the order of the orphans court, they are to make sale of so much of the surplus as consists of specifics. *Evans vs. Iglehart*, 6 *Gill & John.* 171.

When a surplus or residue bequeathed for life, with remainder over, consists of money or property, whose use is conversion into money, and which it could not for that reason be intended, should be specifically enjoyed, nor consumed in the use, as a crop of tobacco or the like, an investment thereof must be made by the executor in some safe and productive fund; and most properly under the direction of the court, so as to secure the dividends to the legatee for life, and the principal after his death, to the legatee in remainder.—*Idem.*

When any article of personal property of such a nature, that *its use is its consumption*, is specifically given to a legatee for life, with remainder over, the legatee for life takes the absolute property in the thing bequeathed, and the same rule applies when the consumable articles are comprised in the bequest of a general residue.—*Idem.*

It has become a settled principle of international law, and one founded on a comprehensive sense of public policy and convenience, that the disposition of the succession to and the distribution of, personal property, where ever situate, is governed by the law of the owner's or intestate's domicil at the time of his death, and not by the conflicting laws of the various places where the goods happened to be situate. 2 *Kent's Com.* 67, 429, 434. *Story on Con. of Laws*, 403.

In a strict and legal sense, that is properly the domicil of a person where he has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning (*animus revertandi.*)—*Id.* 39. That place is properly the domicil of a person in which his habitation is fixed, without any present intention of removing therefrom. There must be the fact and the intent.

In many cases, actual residence is not indispensable to retain a domicil after it is once acquired; but it is retained, *animo solo*, by the mere intention

not to change it, or adopt another. If, therefore, a person leaves home for temporary purposes, but with an intention to return to it, this change of place, is not in law, a change of his domicil. It is not the mere act of inhabitancy in a place, which makes it the *domicil,* but the fact, coupled with the intention of remaining there, *animo manendi.*

The place of the birth of a person is considered as his domicil, if it is at the time of his birth the domicil of his parents. The domicil of the birth of minors continues until they have obtained a new domicil. If the parents change their domicil, that of the infant children follows it, and if the father dies, his last domicil is that of the infant children. A married woman follows the domicil of her husband. The place where a person lives is taken to be his domicil, until the contrary is established by other facts. A widow retains the domicil of her deceased husband until she obtains another. If an adult removes to another place, with an intention to make it his permanent residence, (*animo manendi,*) it becomes instantaneously his place of domicil. If a person has actually removed to another place, with an intention of remaining there for an indefinite period of time, and as a place of present domicil, it becomes his place of domicil, notwithstanding he may entertain a floating intention to return at some future period. Where a married man's family resides, is generally to be deemed his domicil; but it may be controlled by circumstances, for if it is a place of temporary establishment for his family, or for transient objects, it will be otherwise. If a man has his family fixed in one place, and he does his business in another, the former is considered the place of his domicil.

If a married man has two places of residence at different times of the year, that will be established as his domicil, which he himself deems, or describes to be his home, or which appears to be the centre of his affairs, or where he votes or exercises the rights and duties of a citizen. If he be an unmarried man, that is generally deemed his place of domicil where he transacts his business, exercises his profession, or assumes municipal duties or privileges; the original domicil is not gone until a new one is acquired. If a man has acquired a new domicil, different from that of his birth, and he removes from it, with an intention to resume his native domicil, the latter is re-acquired, even while he is on his way, *itemere,* for it reverts from the moment the other is given up. Foreigners who reside in a country for a permanent or indefinite purpose, *animo manendi,* are treated universally, as inhabitants of that country. *Story's Con. of Laws,* 46, 47 and 48. The profession, seeking more information on this subject, will find in that work, references to the civil law, and to all of the adjudged cases in the English and American reports.

The common law incapacity of illegitimate children to inherit, has been partially relaxed by the laws of this state.

AN ACT relating to illegitimate children.—1825, *ch.* 156.

Be it enacted by the General Assembly of Maryland, That from and after the passage of this act, the illegitimate child or children of any female, and the issue of any such illegitimate child or children be, and they are hereby declared to be able and capable in law to take and inherit both real and personal estate from their mother, or from each other, or from the descendants of each other, as the case may be, in like manner as if born in lawful wedlock; *Provided,* That nothing herein contained shall be construed to alter or change the law respecting illegitimate persons, whose parents marry after the birth of such persons, and who are by them acknowledged, agreeably to the seventh section of the act of assembly, passed at December session, eighteen hundred and twenty, chapter one hundred and ninety-one.

May inherit from maternal side.

Proviso.

CHAPTER XXXV.

GUARDIAN AND WARD.

The proceedings to enforce the orders and decrees of the orphans court against guardians, are to be found under the title 'Jurisdiction.'

Guardians and orphans

1. Whenever land shall descend, or be devised, to a male under the age of twenty-one years, or to a female under sixteen, or any such male or female shall be entitled to a distributive share of personal estate of an intestate, or to a legacy or bequest under a last will or codicil, and the said male or female shall not have a natural guardian, or guardian appointed by last will, agreeably to the statute in that case provided, the orphans court of the county where the land lies, or in which administration of the personal estate is granted, shall have power to appoint a guardian to such infant, until the age of twenty-one years (if a male,) and until the age of sixteen (if a female,) or marriage, and such appointment may be made at any time after the probat of the will, or administration granted on the estate of the deceased, under whom the infant appears to be so entitled to land; and it may be made, if the court shall think proper, in the case of personal estate, either before or after the executor or administrator shall have passed his account.—1798, *ch.* 101, *sub ch.* 12.

Orphans court to appoint guardian.

The minority of a female ward is elongated to the age of eighteen.

Female minority extended to eighteen years.

SEC. 5. *And be it enacted*, That the guardianship of all females shall exist and continue until the time when such females shall attain to the age of eighteen years, or be married, and the orphans court of the several counties in this state, shall have the same power to appoint a guardian to a female under the age of eighteen years, and who is unmarried, as they now have to appoint a guardian to a female under the age of sixteen years; and the same proceedings shall be had thereupon in every respect, as are now had in regard to females under the age of sixteen years.—1829, *ch.* 216.

Orphans to be brought into court.

2. The said court shall have power to call or have brought before them any orphan as aforesaid, for the purpose of appointing a guardian.—1798, *ch.* 101, *sub ch.* 12.

Bond to be given by guardian.

3. The court shall also have power, on application of any friend of the infant as aforesaid entitled to land, or legacy, or distributive share, to call on any guardian under the statute aforesaid, or natural guardian, to give bond for performance of his or her trust, and the court, at discretion, may direct such bond to be given; and on the guardian's failure or neglect, the court may appoint another guardian.—*Id.*

Form of bond to be given by guardian.

4. And every guardian appointed by the court, before he shall have authority to act as such, shall enter into bond to the state of Maryland, in such penalty, and with such sureties, as the court shall approve; and the said bond shall be recorded, and be subject to be put in suit, and be in all respects on a footing with the bond given by an executor or administrator; and the form of the condition of it shall be as follows: 'The condition of

the above obligation is such, that if the above bounden —— ——, as guardian to —— ——, of —— county, shall faithfully account with the orphans court of —— county, as directed by law, for the management of the property and estate of the orphan under his care, and shall also deliver up the said property, agreeably to the order of the said court, or the directions of law, and shall in all respects perform the duty of guardian to the said —— ——, according to law, then the above obligation shall cease; it shall otherwise remain in full force and virtue in law.'—*Id.*

Securities on a guardian's bond, executed by a mother, while a *feme covert*, with the assent of her husband, *held* to be liable. *Jarret vs. State, use of Stump*, 5 *Gill & John.* 27. The securities on a guardian's bond not released where the court upon their application, coerced the guardian to give counter security. *McAth vs. State use of Wheeler*, 6 *Har. & John.* 98. Whenever the executor or administrator acts also in the character of guardian, the liabilities on the testamentary or administration bond cease from the time he ought to have made his settlement in the orphans court, and from that time his liabilities are transferred to his guardian bond; but this constructive transfer of liabilities from the testamentary or administration bond to the guardian's bond, takes place only in the case of a sole executor. *State vs. Jordan*, 3 *Har. & McHen.* 99. *Seagar vs. State*, 6 *Har. & John.* 162. *Watkins vs. State*, 2 *Gill & John.* 226.

A *feme sole* at the age of sixteen, passed her receipt in full to her guardian without having received the sum due her, but in consideration of the guardian's single bill, the guardian's bond was yet liable for the sum due her. *Boyers vs. State, use of Dryden*, 7 *Har. & John.* 32. *State vs. Fridge*, 3 *Gill & John.* 103. *Davis vs. Jacquin & Pomrat*, 5 *Har. & John.* 110.

Bonds of executor and guardians answerable for proceeds of sale of real estate.

Sec. 11. *And be it enacted*, That the bond of an executor or executrix or guardian, which may be hereafter executed, shall be answerable for the proceeds, or sales of the real estate of the testator, testatrix or ward, as the case may be, or any part thereof, which may come into his or her possession in the same manner, and shall be liable to the same extent as if it were personal estate in his or her hands, and any person conceiving him or herself interested in such estate, or in the proceeds or sales thereof, shall be entitled to, and have on demand a copy of such bond, and a certificate from the register, under his hand and the seal of his office, upon which copy and certificate an action may be maintained in the name of the state, for the use of the party interested, and judgment may be recovered upon such action for the damage actually sustained.—1831, *ch.* 315.

Suit thereon authorized.

Property to be delivered to guardian.

5. On a guardian's executing such bond, the court shall have power to order the land, distributive share, or other property belonging to such orphan, to be delivered to such guardian immediately, or at such time as shall appear reasonable: in the case of a legacy or bequest, the court shall direct the delivery as soon as it shall appear that the same may be delivered without prejudice to the person administering: and in the case of a distributive share, the court shall direct the delivery as soon as the same shall be ascertained: and on failure of any former guardian appointed by the court, or of an executor or administrator, to comply with such order, his bond may be put in suit, and he may also be attached for contempt, and fined not exceeding

Penalty for not complying.

Guardian may be called on for new security.

three hundred dollars aforesaid; and the court shall have power to call on any guardian for new security, and on failure, may appoint a new guardian.—1798, *ch.* 101, *sub ch.* 12.

A guardian has no right to retain money received by him from an executor, unless the executor has passed a final account with the orphans court, and the court has ordered the money to be paid over to the guardian. *Wilson vs. Boyer,* 1 *Har. & John.* 297.

Real estate of a ward to be appraised within three months.

6. Every guardian appointed by the court, having the care of a real estate, shall, within three months after executing his bond, procure the said estate to be viewed and reported on by two skilful and discreet persons, not related to either party, and appointed by the orphans court, which two persons, before they proceed to act, shall swear, or affirm, as the case may be, before some judge or justice, that they will appraise the same without favour or prejudice, and to the best of their skill and judgment: and it shall be the duty of the appraisers to examine the estate, and estimate the annual value thereof, including any slaves, working beasts and stock, and utensils thereon belonging to the orphan, and proper to be leased with the land: they shall likewise set down, in writing, what dwelling-houses, out-houses, orchards, gardens, meadows, enclosures, and other improvements, are on the land, and the condition thereof, and what proportion of the said land is in their estimation in woods: and they shall make a certificate under their hands and seals, of the whole they have done, to which shall be annexed a certificate of their appointment, and of their having taken the oath or affirmation as aforesaid, and the same shall be returned by the guardian to the orphans court, within three months as aforesaid: and the same shall be evidence against him, in case of any suit for misconduct brought against him.—*Id.*

Guardian not to commit waste on the land.

7. No guardian shall commit waste on the land, but the court may, on his application, allow him to cut down and sell wood, and account for the same, in case it shall deem the same advantageous or necessary for the ward's education and maintenance.—*Id.*

Management of real estate by a guardian.

8. And each guardian having a real estate under his care, shall either cultivate the same, with the slaves, stock and utensils, belonging to the ward, or to be purchased with his or her money, with the approbation of the court, or he shall lease the same from year to year, or for any term not exceeding three years, and within the non-age of the ward; or he may, with the court's approbation, undertake the estate on his own account, and be answerable for the annual value, such annual value to be every third year ascertained, under the direction of the court.—*Id.*

Increase and decrease.

9. Every guardian shall account for all profit and increase of the estate, or annual value as aforesaid, and shall not be answerable for any loss or decrease sustained without his fault, to be allowed by the orphans court.—*Id.*

10. And once in each year, or oftener if required, a guardian shall settle an account of his trust with the orphans court; and the said court shall ascertain, at discretion, the amount of the sum to be annually expended in the maintenance and education

of the orphan, regard being had to the future situation, prospects and destination, of the ward: and the said court, if it shall deem it advantageous to the ward, may allow the guardian to exceed the income of the estate, and to make use of his principal, and to sell part of the same, under its order: *provided nevertheless*, that no part of the real estate shall, on account of such maintenance or education, he diminished, without the approbation of the court of chancery, as well as of the orphans court.—*Id.*

An account to be rendered once a year, or oftener if required.

Accounts passed by the guardian with the orphans court, are not conclusive evidence for or against a guardian, but only *prima facie* evidence of the balance due by the guardian to the ward, at the time when the accounts were passed, and are open to an examination by the court and jury, and the ward may give other evidence to show that the accounts were erroneous, or that the orphans court had exceeded their authority, or made improper or unreasonable allowances to the guardian in the account. *Spedden vs. State, use of Marshal*, 3 *Har. & John.* 251. Vide ante page 17.

Where a sum of money is allowed by the orphans court to a guardian for the maintenance of the ward, exceeds the annual income of his ward's estate, the guardian is concluded thereby, and the jury cannot exceed the sum so allowed by the orphans court.—*Ibid.*

The interest or income of a minor's estate is the fund out of which he is to be educated or maintained, and under no circumstances, could be exceeded until the act of 1785, chap. 80. By the ninth section of that law, the orphans court may allow a guardian to apply a part of the personal estate, not exceeding a tenth, to the education of his ward, this section only enlarged that authority by extending the expenditure, to any part or the whole of the personal estate of the ward. Should the application of the whole personal estate be not sufficient for that object, suitably for the future destination of the ward, then a part of the real estate may be applied under the direction of the court of chancery and the orphans court. *Brodis vs. Thompson*, 2 *Har. & Gill*, 120.

It is the province of a guardian, under the laws of this state, to take care of the person of his ward; and it is imperatively his duty, to take care of, and preserve his property of every kind and description. Repairs, necessary for those ends, within the compass of the ward's income, ought to be attended to, but schemes of improvement, under no circumstances, ought to be engaged in; and the orphans court have no authority to sanction them by the application of any portion of the principal of the ward's estate.—*Ibid.*

11. And on the first account to be rendered by a guardian, he shall state the property by him received from an executor or administrator, or otherwise belonging to his ward, and every increase, and the profits thence arising, if any.—1798, *ch.* 101, *sub ch.* 12.

First account.

12. In case the personal property of a ward shall consist of specific articles, such as slaves, working beasts, animals of any kind, stock, furniture, plate, books, and so forth, the court, if it shall deem it advantageous for the ward, may, at any time, pass an order for the sale thereof, for ready money, or on credit, the purchaser, with security, giving bond to the said ward, bearing interest; and all proceedings relative to such sale shall be as herein directed with respect to sales by executors or administrators.—*Id.*

Sale of property.

13. Every account of a guardian shall state his expenditures in maintaining and educating the ward, not exceeding the income of the estate, unless allowed by the court; and for no balance of money in his hands shall he be charged interest, unless he shall

Guardian's account.

consent to take the same on interest, but the court may direct him to place the same at interest, taken bond to the orphan, with security approved by the court; and for the trouble and care of such guardian, the court may allow any commission, not exceeding ten per cent.—*Id.*

Commission.

14. On a guardian's failing to account as herein before directed, his bond shall be liable to be put in suit, and he shall also be liable to attachment and fine as aforesaid, but he shall not be liable to any fine in a court of law, any act to the contrary notwithstanding.—*Id.*

Penalty for failing to account.

15. On the ward's arrival at age as aforesaid, the guardian shall exhibit a final account to the orphans court, and shall deliver up to the court's order, to the said ward, or the husband, (as the case may require,) all the property of such ward in his hands, including bonds, and other securities, and on failure his office bond shall be liable, and he also shall be liable to attachment and fine as aforesaid.—*Id.*

Property to be delivered up on ward's arrival at age.

It is the duty of a guardian to a female ward on her arrival at age, to exhibit a final account to the orphans court, and to deliver to the ward all the property in his hands, and on his failure to do so, the ward is absolutely entitled to interest. *Fridge vs. State*, 3 *Har. & Gill*, 105. The ward is incompetent before the age of twenty-one, to execute a release to her guardian, although she has capacity to receive payments at the age of eighteen. *Vide postia, act of* 1831, 305, *sec.* 6.

16. Nothing in this act contained shall be construed to affect the general superintending power exercised by the court of chancery with respect to trust.—*Id.*

It has already been stated that an appointment of a guardian by a foreign tribunal confers no right to demand and institute a suit (for a legacy due his ward) in the courts of this state, yet Chancellor Kent in the case of *Williams vs. Storrs*, 6 *John Ch. Rep.* 363, says, '*it seems* a voluntary payment to the administrator or guardian deriving their power from a foreign tribunal, would protect the party paying.' *Vide page* 69.

2. *And be it enacted*, That if any security of a guardian, appointed by virtue of the act to which this is a supplement, shall conceive him or herself in danger of suffering from the suretyship, he may apply to the orphans court by which such guardian was appointed, and the said court may call on such guardian to give counter security, and if the said guardian shall not within a fixed reasonable time, give such counter security, the said court may revoke the appointment of such guardian, and appoint a new guardian; and in case the guardian whose appointment is revoked as aforesaid, shall refuse or neglect, in a reasonable time after demand, to deliver over to such new guardian the property of the ward, the said court may compel the same by attachment, and may direct the bond of such displaced guardian to be put in suit.—1807, *ch.* 136.

In certain cases guardian may be called on to give counter security, &c.

4. *And be it enacted*, That the said several orphans courts be and they are hereby authorized and empowered to appoint a guardian or guardians to an infant, who may acquire real or personal property by gift or by purchase, in the same manner, with the same powers, and upon the same terms and conditions, that they may appoint a guardian or guardians to an infant acquiring such property by descent, devise or in right of distribution.—*Id.*

Court authorized to appoint guardians to infants who may acquire property by gift or purchase, &c.

1. *Be it enacted by the General Assembly of Maryland*, That where any infant or infants are or shall be possessed of any lands, tenements, hereditaments, or real estate, whatsoever, it shall and may be lawful for the chancellor, or for the several county courts within this state, as a court of equity, upon the petition of the guardian or *prochein ami*, of such infant or infants after summoning such infant or infants, and his appearance by guardian to be appointed by the chancellor, or the county courts as aforesaid, and upon the hearing and examination of all circumstances, and upon its appearing to the said chancellor, or the county courts as aforesaid, that it will be for the interest and advantage of such infant or infants to sell such lands, tenements, hereditaments or real estate, or any part thereof, to order and direct such lands, tenements or hereditaments, or any part thereof, to be sold upon such terms as the chancellor or the county courts as aforesaid may direct.—1816, *ch.* 154.

Chancellor, &c. in certain cases, may direct the sale of real estate.

5. *And be it enacted*, That the proceeds of the sales made by and in virtue of this law, shall be paid over by the trustee or trustees to the guardian or guardians of such infant or infants, to be by such guardian or guardians vested in such public stock, or other permanent funds, as will at least net six per centum per annum at the time of the purchase, and as the orphans court of the county, by whom such guardian or guardians shall have been appointed, shall direct.—*Id.*

Proceeds to be vested in public stock

6. *And be it enacted*, That the surplus interest, after what may be necessary for the maintenance and education of the said infant or infants respectively, as it accrues, shall be vested by such guardian or guardians, in such stock as aforesaid, and as the orphans court shall and may direct as aforesaid.—*Id.*

Surplus to be invested.

7. *And be it enacted*, That all moneys vested by and in virtue of this law, shall be vested in the name of such infant or infants, and shall be transferable only by virtue of an order of the orphans court aforesaid, and all transfers without such order are hereby declared be void to all intents and purposes.—*Id.*

To be vested in name of infants.

8. *And be it enacted*, That no part of the principal arising from the sale of any real estate by virtue of this law, shall in any wise be applied towards the maintenance or education of any infant, unless the chancellor or the county court, as the case may be, shall consider it necessary for the education or maintenance of the minors.—*Id.*

Principal not to be applied to education of infants, unless considered necessary.

9. *And be it enacted*, That in case of the death of any such infant or infants before their arrival at lawful age, or his, her or their death without lawful issue, the proceeds of the said sale, or the said stock shall be considered as real estate, and as such shall descend to those heirs or representatives who would be entitled to the said lands, in the same manner, as if the same had not been sold in virtue of this law.—*Id.*

How property is to descend in case of infant's death.

1. *Be it enacted by the General Assembly of Maryland*, That every natural guardian or guardians appointed by last will and testament, of the estate or property of minors, shall give bond, with securities to be approved by the orphans court; shall settle the accounts of their guardianship, and shall be under the like rules and regulations as are prescribed by the original act to

Natural guardians to give bond, &c.

which this is a supplement with respect to other guardians. 1816, *ch.* 203.

Orphans courts to empower them to sell leasehold estates, and vest the proceeds.

2. *And be it enacted*, That the orphans court shall have authority to empower any guardian to sell any leasehold estate belonging to his ward, if the court shall think such sale advantageous to such minor, and shall order the proceeds of such sale or any surplus money belonging to said minor or orphan, to be invested in bank stock, or any other good security, which investment shall be made in the name of the minor or orphan, and that no sale, transfer or disposal of the stock, of such minor or orphan, shall be made without the concurrence of the orphans court.—*Id.*

Sale of real estate may be decreed to save the personal, with consent of parties.

8. *And be it enacted*, That a sale of the real estate may be decreed in the discretion of the chancery court, and the county courts as courts of equity, in order to save the personal, with the consent of all parties of full age, and the actual guardian of minors.—1819, *ch.* 193.

Executors, &c. to take possession of estate and fulfil duties of guardians, &c.

1. *Be it enacted by the General Assembly of Maryland*, That whenever any person shall die seized or possessed of any lands, tenements or hereditaments, situate and lying within the state, and any of the persons entitled to such lands, tenements or hereditaments, or any part thereof, shall be under age, and without a guardian appointed by last will and testament, or by the orphans court, it shall be the duty of the executor or executors, administrator or administrators, as the case may be, of such deceased, as soon as letters testamentary or of administration shall be committed to him, her or them, and not before, to take possession of such estate, and to discharge and fulfil all the duties of guardian to such minor until a guardian shall be regularly appointed by the orphans court, or until the said minor shall arrive at age, which ever shall first happen, and shall account with the said court in like manner as guardians are by law required to account, and subject to the like control and authority of the court in all respects whatever.—1820, *ch.* 174.

When guardians are appointed, &c. to render an account of the manner in which they have discharged their duties, &c.

2. *And be it enacted*, That when a guardian or guardians shall be appointed to such minor, or the said minor shall arrive at age, which ever shall first happen, it shall be the duty of the aforesaid executor or executors, administrator or administrators, as the case may be, to render to the orphans court an account, on oath, of the manner in which the duties imposed by this act have been discharged, in the same manner and upon the same principles as guardians are now required by law to settle their accounts, and subject to the like control and authority of the court in all respects whatever, which said account shall be separate and distinct from the administration of the personal estate of the said deceased; and the orphans court shall thereupon pass an order directing such executor or executors, administrator or administrators, as the case may be, to pay over to the guardian or guardians to be appointed as aforesaid, or to the person entitled, as the case may be, any money remaining in his, her or their hands, belonging to such minor, which shall have arisen from the profit of the real estate belonging to the said minor, and also to deliver over to such guardian or guardians, or person entitled, as the case may

be, the real estate of such minor; and upon the neglect or refusal of the executor or executors, administrator or administrators, to obey such order, or to return an account as herein before directed, his, her, or their testamentary or administration bond, as the case may be, shall be liable to be sued by such guardian or guardians, or person entitled as aforesaid, and the orphans court may moreover proceed against such executor or executors, administrator or administrators, as the case may be, by attachment and sequestration.—*Id.*

AN ACT to relieve executors and administrators from the obligation of performing the duties of guardians, as is required by an act passed at December session, eighteen hundred and twenty, chapter one hundred and seventy-four.—1825, *ch.* 63.

SEC. 1. *Be it enacted by the General Assembly of Maryland*, That no executor, executrix, administrator or administratrix, shall be bound in any manner to discharge and fulfil the duties of guardian after the close of their administration, or after the end of three years from the granting such letters of administration; any thing in the act of assembly, passed at December session, eighteen hundred and twenty, chapter one hundred and seventy-four, to the contrary notwithstanding. Administrators relieved.

2. *And be it enacted*, That nothing herein contained shall be so construed as to relieve executors and administrators from the duty of accounting with the orphans court or otherwise, for the manner in which they have performed the trust imposed on them so long as they shall have acted as guardian according to the directions of the above recited act. Accountability.

Be it enacted, by the General Assembly of Maryland, That in case of the death of any guardian, before an account of his or her guardianship shall have been settled with the orphans court, it shall be the duty of his or her executor or administrator, executrix or administratrix to render such account, shewing thereby the amount with which such guardian may be properly chargeable, and the disbursements made by the deceased guardian, and the account so rendered, shall be examined by the court, and if found to be correct, shall be admitted to record in the same manner that other guardian's accounts are examined and recorded. 1827, *ch.* 210. Administrators, &c. of guardians, shall account for guardianship, &c.

SEC. 2. *And be it enacted*, That in case of the death of any executrix, administratrix, or female guardian, before a final account of her administration or guardianship shall have been settled with the orphans court, and who shall have a husband living at the time of her decease, it shall be the duty of such husband to render an account, shewing thereby, the amount of money and property received, and the payments and disbursements made by such executrix, administratrix, or female guardian, or that may have been received and paid by the husband of such executrix, administratrix, or guardian, and not before accounted for, with the court, and the account so rendered shall be examined by the orphans court, and if found to be correct, shall be admitted to record in the same manner, and shall be subject to the same rules and regulations, as other administrators or guardian ac- Proceedings directed in cases therein mentioned.

counts are, in cases where the executrix, administratrix or guardian, renders them in person; and in case the husband shall neglect, or refuse to render such account, the orphans court of the county in which administration is granted, or where the guardian was appointed, (or if it be the case of a testamentary guardian, where he or she is obliged to render an account,) shall proceed against him by attachment, and may commit such husband, until he shall render an account as aforesaid.—1829, *ch.* 216.

Copy of bond of indemnity legalized.

Sec. 3. *And be it enacted*, That in all cases where any bond shall have been or may hereafter be executed, and made payable to the state of Maryland, by an executor or executrix, administrator or administratrix, or guardian, for the purpose of indemnifying and saving harmless, any security or person interested in the estate of any security, on his or her testamentary administration or guardian's bond, any such security or person interested in the estate of such security, shall be entitled to, and have on demand a copy of such bond, certified by the register of wills, under his hand and the seal of his office; upon which copy, an action may be maintained in the name of the state, for the use of the party or parties interested, and judgment may be recovered upon such action, for the damage or loss actually sustained.—*Id.*

Counter security may be demanded by guardians, &c.

Sec. 4. *And be it enacted*, That any person who may be interested in the estate of any security of a guardian or guardians, shall have the same right and privileges, to call upon such guardian or guardians, to give counter security in the same manner as a security to a guardian may now call for counter security, and the same proceedings shall be had thereupon by the orphans court of the county, in which the guardian or guardians may have been appointed, (or given bond in case it be a natural or testamentary guardian) as if the application or call had been made by a security to a guardian, according to the provisions of the act of eighteen hundred and seven, chapter one hundred and thirty-six, section two.—*Id.*

Guardian of female to deliver over property at the age of eighteen.

Sec. 6. *And be it enacted*, That on a female ward attaining to the age of eighteen years, or marriage, her guardian shall exhibit a final account to the orphans court where such guardian shall have given bond, and shall deliver up agreeably to the court's order, to the said ward, or to the husband, if she be married, all the property of such ward in the hands of her guardian, including bonds and other securities; and on failure, his office or guardian's bonds shall be liable, and he shall also be liable to attachment and fine, not exceeding three hundred dollars.—*Id.*

The disabilities of infancy are not removed by this act, except in the particular cases herein expressly provided. A female under the age of twenty-one, cannot dispose of her personal property though entitled to the possession of it at the age of eighteen. *Davis vs. Jacques & Pomrat.* 5 *Har. & John.* 110.

Court may order executor, administrator or guardian to bring into court or

Sec. 5. *And be it enacted*, That the orphans court of the several counties in this state, be, and they are hereby authorized and empowered in their discretion, and whenever to them it shall seem proper to order any executor or administrator, to whom they may have granted letters testamentary or of administration, or any guardian whom they may have appointed, or whose bond

they may have approved of, if it be a natural or testamentary guardian, to bring into court, or place in bank, or invest in bank or other incorporated stock, or in any other good security, any money or funds received by such executor, administrator or guardian, and the court shall direct the manner and form in which such money or funds shall be placed in bank or invested as aforesaid, and the same shall at all times be subject to the order and control of such court, and if such executor, administrator or guardian, shall not within a reasonable time to be fixed by the court, comply with the order of the court, the letters testamentary or of administration granted to such executor or administrator, or the guardianship, as the case may be, may be revoked by the court. 1831, *ch.* 315.

deposite or invest funds subject to order of court.

Case of neglect.

Letters revoked.

Sec. 6. *And be it enacted*, That in all cases hereafter, whenever any orphans court in this state, shall revoke letters testamentary, or of administration, or of guardianship, it shall be the duty of the party, whose letters or guardianship may be revoked, forthwith, to render to such court an account of his administration or guardianship, as the case may be, up to the period of the rendition of such account, and in case he shall fail so to do within the time fixed by such court, the court may compel the rendition of such account by attachment, sequestration of property, and the imprisonment of the party so failing, until such account shall be rendered as aforesaid.—*Id.*

Case of revoking letters.

Account to be rendered

On failure.

Sequestration or imprisonment.

Sec. 8. *And be it enacted*, That when any orphans court in this state shall revoke the guardianship of any guardian, and there be no remaining guardian, it shall be the duty of such court to appoint a new guardian, and in all cases hereafter if the party whose guardianship is revoked shall not within a reasonable time to be fixed by such court, deliver over to the remaining guardian, if there be one, if not, then to the new guardian, all the property of the ward remaining in the hands of the party whose guardianship is revoked as aforesaid, and also all the books, bonds, notes and evidences of debt or funds, and also all title to property or stock which belong to, or are due, or which become due to the ward in the possession of the guardian whose guardianship may have been revoked as aforesaid; and also pay over to the remaining guardian, if there be one, if not, then to the new guardian, all the money due to him as guardian of the ward; the said court may compel the delivery and payment over as aforesaid by attachment and sequestration of the property of the party whose guardianship may be revoked, and may direct to be put in suit the bond of the guardian, whose guardianship shall have been revoked as aforesaid.—*Id.*

Case of revoking guardianship.

Former guardian to deliver over

On Failure

Sequestration and suit.

Sec. 9. *And be it enacted*, That any allowance which may have been heretofore made, or which may hereafter be made by any orphans court in this state to a guardian for the clothing, support, maintenance, education, or for other expenses incurred by the guardian, for his ward, or his estate, and which shall have accrued subsequent to the death of the father of such ward, and before the guardian may have been appointed or given bond, such allowance shall have the same effect and operation in law to all intents and purposes, as if such expense of the ward or

Allowance to guardian for expenses of ward.

his estate had accrued, and become due subsequent to the time of the appointment of such guardian or of his giving bond.—*Id.*

Limit as to citation.

SEC. 15. *And be it enacted*, That no register of wills shall, *ex officio*, issue any citation to any guardian for the rendering of an account where the annual income or profits of the estate of the ward shall not exceed fifty dollars.—*Id.*

Case in which executors, &c. authorized to pay over to guardians &c.

SEC. 1. *Be it enacted by the General Assembly of Maryland*, That where any infant is or shall be entitled to any legacy or distributive share of an estate or any personal property in the hands of an executor or administrator, and a guardian for such infant has or shall have been appointed by any orphans court of this state, whose appointment however, has been or shall have been irregularly made, or is or shall be liable to be revoked or declared void for any cause whatsoever, but is not or shall not have been revoked or declared void, any payment or delivery to such guardian of such legacy, distributive share, or personal property by such executor or administrator shall have the same force, validity, and effect as respects such executor or administrator as if said guardian's appointment were regularly made, and not for any cause liable to be revoked or declared void. 1833, *ch.* 15.

Payment valid.

Liability of guardians.

SEC. 2. *And be it further enacted*, That every such guardian, so receiving money or other property as aforesaid, belonging to his or her ward, shall be liable to account for the same, to be recovered by suit on his or her guardian bond, or otherwise, as now provided for by law, in case of guardians duly and regularly appointed.—*Id.*

AN ACT relating to Guardians and Wards.—1834, *ch.* 73.

Authority to appoint for females over eighteen years.

Be it enacted by the General Assembly of Maryland, That in all cases where there hath been, or may hereafter be, an appointment of a guardian of a female above the age of eighteen years, by last will and testament, and the person so appointed shall have died, or renounced, or refused to act, it shall be lawful for the orphans court of the county in which the said will shall have been proved, to appoint a guardian in the place of the person so dying, renouncing or refusing to act; and the person so appointed by the orphans court, shall give bond in the same manner as guardians appointed for infants under age, and shall have the same powers, perform the same duties, and be entitled and bound to perform them for the same length of time, or up to such period as the person appointed by the will, if he had lived and taken upon him the trust and duty reposed in him by the will, and shall be bound to render and settle an account of his guardianship or trust to the orphans court, in the same manner and at the same time as other guardians of minors appointed by the orphans court are now required by law to render and settle their guardians accounts.

Where mother is guardian.

SEC. 1. *Be it enacted by the General Assembly of Maryland*, That in all cases in which the mother is left the natural guardian of her infant children, the orphans court of the several counties of this state, are hereby authorized and required to allow the

mother, as natural guardian, in the settlement of her accounts, all such charges, expenses and commissions, as are or may be authorized by law in the case of other guardians.—1834, *ch.* 228. Allowance.

The liability of guardians to pay interest to their wards is regulated by the like principles that control the conduct of executors and administrators. *Vide ante page* 91.

CHAPTER XXXVI.

RIGHTS OF WIDOWS.

1. Every devise of land, or of any estate therein, or bequest of personal estate, to the wife of the testator, shall be construed to be intended in bar of her dower in lands, or share of the personal estate respectively, unless it be otherwise expressed in the will.—1798, *ch.* 101, *sub ch.* 13. Rights of Widows.

2. A widow shall be barred of her right of dower in land, or share in the personal estate, by any such devise, or bequest, unless within ninety days after the authentication or probat of the will, she shall deliver, or transmit to the court where such authentication or probat hath been made, a written renunciation in the following form, or to the following effect: 'I, A. B. widow of —— ——, late of ——, deceased, do hereby renounce and quit all claim to any bequest or devise made to me by the last will of my husband, exhibited and proved according to law; and I elect to take, in lieu thereof, my dower, or legal share of the estate of my said husband, A. B.' But by renouncing all claim to a devise or bequest, or devises or bequests of personal property, made to her by the will of her husband, she shall be entitled to one-third part of the personal estate of her husband, which shall remain after payments of his just debts, and claims against him, and no more.—*Id.* Widows' renunciation of a will. To have the one-third of personal estate.

The right of election upon the contingency of the widow's dying within the time limited for her election, without having made it, is a personal right, and does not devolve on her personal representative. *Boone vs. Boone,* 3 *Har. & McHen.* 95.

Sec. 2. *And be it enacted,* That the time allowed by law for a widow, to make her election, whether she will accept of or renounce a bequest or devise, made to her by the will of her husband, be, and the same is hereby extended to the period of six months, from the day upon which administration may be first granted on her husband's estate; and whenever any widow who may hereafter deliver or transmit to the register of wills, of the county in which administration may be granted on her husband's estate, her written renunciation within the period aforesaid, such renunciation shall have the same effect and operation in law to all intents and purposes, as if she had renounced the same within ninety days, after the authentication or probat of the will: *Provided,* That nothing in this section contained shall extend to cases in which at the time of the passage of this act, ninety days shall have elapsed from the authentication or probat of any will. 1831, *ch.* 315. Time for widows to elect to renounce a bequest or devise extended to six months. Renounce in writing. Proviso.

Marriage settlement shall bar dower, but not devises.

XXXVII. *Provided always*, That if any married woman shall have any estate settled upon her, by jointure or other settlement, before marriage, such jointure or settlement shall bar her of her dower of her husband's lands; yet it shall be lawful for her to accept what her husband shall by his last will and testament devise her.—1715, *ch.* 39.

I have ventured to print the preceding section, notwithstanding the opinion of Chancellor Kilty, expressed in his note to this chapter, 'that all of its provisions are repealed by the act of 1798, chap. 101;' for I have learnt from gentlemen of the bar, that Baltimore county court, (chief judge Walter Dorsey, delivering the opinion of the court,) decided that this section was *not* repealed. The counsel engaged in the cause, acquiesced in the opinion of the court. *Vide Appendix.*

If the deceased dies intestate, leaving a wife, and without a child, the widow shall have one-half of the personal estate. If the deceased makes a will, and makes no bequest of *any part* of his personal estate to her, or an inoperative bequest to her, and dies, and leaving no child, she shall have one-half of the personal estate. *Griffith vs. Griffith*, 4 *Har. & McHen.* 480. *Coomes vs. Clements*, 4 *Har. & John* 480.

If the personal estate of the deceased is not sufficient, after payment of the debts, to pay the widow her third part thereof, negroes bequeathed to be free, may be allotted to her as slaves for life. *Negro William vs. Kilty*, 5 *Har. & John.* 59.

When part of real and personal estate devised

3. If the will of the husband devise a part of both real and personal estate, she shall renounce the whole, or be otherwise barred of her right to both real and personal estate.—1798, *ch.* 101, *sub ch.* 13.

When part of real or part of personal.

4. If the will devise only a part of the real estate, or only a part of the personal estate, the devise shall bar her of only the real, or personal estate, as the case may require; *provided nevertheless*, that if the devise of either real or personal estate, or of both, shall be expressly in lieu of her legal share of one or both, she shall accordingly be barred, unless she renounce as aforesaid.—*Id.*

When nothing passes by devise.

5. But if in effect, nothing shall pass by such devise, she shall not be thereby barred, whether she shall or shall not renounce as aforesaid, it being the intent of this act, and consonant to justice, that a widow accepting, or abiding by a devise, in lieu of her legal right, shall be considered as a purchaser with a fair consideration.—*Id.*

Waste.

6. If a widow commit waste in the lands of the deceased, she shall be liable to an action by the heir or devisee, or his or her guardian; and if she marry a second husband, he shall be answerable for any waste committed by her before marriage, or by himself.—*Id.*

7. A widow's remedy for her dower shall be as heretofore.—*Id.*

An Act relating to *femes covert*.—1813, *ch.* 100.

Females, foreigners, marrying in the United States may claim dower, &c.

Be it enacted, by the General Assembly of Maryland, That any free white female, born without the limits or jurisdiction of the United States, who hath intermarried, or shall intermarry with a citizen of the United States, and doth or shall actually reside therein after such intermarriage, such female shall have and enjoy, within this state, all the immunities, rights and privileges, of a native born citizen, so far as to enable such female

to claim, hold and acquire, in dower, or by gift, grant, purchase, descent, or otherwise, any lands, tenements or hereditaments, and to sell, convey, transfer and transmit the same, agreeably to the laws of this state, to a citizen or citizens of the United States, as fully and amply as if such female had been born within the limits and under the jurisdiction of the United States.

Award to widow entitled to dower, and consenting to a sale.

10. *And be it enacted*, That in case a widow shall be entitled to any right of dower, and will consent to the sale of the whole estate, she shall signify her consent in writing, and the same shall be filed with the clerk of the county court, or the register of the chancery, as the case may be, and thereupon the trustee or trustees as aforesaid, shall proceed to sell the whole estate, according to the terms to be prescribed as aforesaid, free and disencumbered of any right of dower of the said widow in and to the same, and in consideration thereof, the chancellor, or county courts respectively, shall award to such widow such proportion of the purchase as he or they shall think just and equitable, not exceeding more than one-seventh part, nor less than one-tenth part of the net proceeds of the said sales, according to the age, health and condition, of such widow, and such award of payment shall be a sufficient bar to all and every right or title of dower which such widow may claim in and to such real estate so as aforesaid sold.—1816, *ch.* 154.

Proceedings in case widow does not consent.

11. *And be it enacted*, That in case the widow shall not elect, that the lands, tenements or hereditaments, so ordered to be sold, shall be sold free, clear and unencumbered of any right of dower which she may have in and to the same, then, and in that case, it shall and may be lawful for the chancellor or the county courts, as the case may be, to issue a commission, to five commissioners, in the same manner as directed by an act, entitled, An act to direct descents, and of the several supplements thereto: and the said commissioners shall proceed in manner and form as is directed by the said acts, to lay off and locate the widow's dower, in and to the said lands, tenements and hereditaments, and the said commissioners shall make return of the said location to the chancellor, or county courts, as the case may be, for rejection or confirmation, as in other cases under the said act, and of the several supplements thereto.—*Id.*

Widows shall be entitled to dower in lands held by equitable title in the husband, &c.

10. *And be it enacted*, That widows shall be entitled to dower in lands held by equitable title in the husband, unless the same be devised by a will made before the passage of this act; but such right of dower shall not operate to the prejudice of any claim for the purchase money of such lands, or other lien on the same: and tenants by the courtesy shall be entitled for life to lands held by equitable title, but not to the prejudice of any claim for the purchase money of such lands or other lien on the same.—1818, *ch.* 193.

CHAPTER XXXVII.

RELEASES, ACQUITTANCES AND DISCHARGES TO EXECUTORS, ADMINISTRATORS AND GUARDIANS.

Final discharges, &c. of executors, &c. may be recorded.

1. *Be it enacted by the General Assembly of Maryland*, That all receipts, acquittances, releases or final discharge, from any heir, representative or legatee, of full age, or other persons authorized to execute the same, to any guardian, executors, or administrator, which shall have been acknowledged before any justice of the peace, or register of wills of the county wherein such heir, representative, legatee, or other persons authorized to execute the same, resides, may be recorded; and it shall be the duty of the register of wills of the county where such guardian was appointed, or such executor or administrator obtained letters testamentary or letters of administration, to record any such receipt, acquittance, release or final discharge, produced to be recorded, in a well-bound book to be kept for that purpose.—1809, *ch.* 168.

Copy of such discharge, duly attested to be evidence.

2. *And be it enacted*, That a copy of any such receipt, acquittance, release or final discharge, acknowledged and recorded as aforesaid, duly attested under the seal of the office in which the same is recorded, shall, at all times hereafter, be admitted as evidence to prove such receipt, acquittance, release or final discharge.—*Id.*

Release, &c. by a non-resident, acknowledged and certified, may be recorded.

3. *And be it enacted*, That any receipt, acquittance, release or final discharge, from any heirs, legatee, representative of full age, or other persons authorized to execute the same, to any executor, administrator or guardian, by a non-resident of this state, acknowledged as aforesaid in the town, city, county or place, where such person may reside, with a certificate of such acknowledgment, and seal of office thereto annexed, may be received and recorded by such register, and placed on his record, as other receipts, acquittances, releases or final discharge, may be recorded, and admitted in evidence as aforesaid; and such register of wills may ask, demand and receive, such fee for recording the same, as is allowed by law in other cases of a similar nature.—*Id.*

Where representatives of a deceased party make acknowledgments of receipts to an executor for their portions of the testator's estate, before a justice of the peace or register of wills of any county, in absence of proof of actual residence elsewhere, they will be presumed to reside in the county where the acknowledgments were taken. *Carroll vs. Tyler*, 2 *Har. & Gill*, 54.

Powers of attorney to be recorded.

Sec. 1. *Be it enacted by the General Assembly of Maryland*, That from and after the passage of this act, all powers of attorney from any heir, representative or legatee of full age, or other person authorized to execute the same, which has been or shall be hereafter acknowledged before any justice of the peace of this state, and which said justice of the peace shall be certified to be a justice of the peace by the clerk of the county court of the county of which he is a justice of the peace under the seal of the said court, or before any judge of any court of record in this state, or of either of the other United States or the territories

thereof, which said judge shall be certified to be a judge of such court, by the clerk of said court, under the seal thereof, and any receipt, acquittance, release or final discharge made in pursuance of the authority granted by such power of attorney, to any guardian, executor or administrator, which said receipt, acquittance, release or final discharge, shall have been or may be hereafter acknowledged before any justice of the peace of the city or county, or before the register of wills of the county, where such guardian was appointed, or such executor or administrator obtained letters testamentary or of administration, may be recorded: and it shall be the duty of such register to record any such power of attorney, receipt, acquittance, release or final discharge produced to be recorded, in a well bound book, to be kept for that purpose: *provided, nevertheless*, that no such power of attorney, receipt, acquittance, release or final discharge shall be recorded unless the justices of the court wherein it is desired to record the same, shall in the first instance approve of and direct the recording thereof.—1825, *ch.* 160.

Office copy sufficient evidence.

2. *And be it enacted*, That a copy of any such power of attorney, receipt, acquittance, release or final discharge, acknowledged and recorded as aforesaid, duly attested under the seal of the office in which the same is recorded, shall at all times hereafter be admitted as evidence to prove such power of attorney, receipt, acquittance, release or final discharge.—*Id.*

Release thereupon confirmed.

Sec. 7. *And be it enacted*, That from and after the passage of this act, any receipt, acquittance, release or final discharge, which shall be executed before the orphans court of the county where the estate shall have been settled, by a female of the age of eighteen years, to any guardian, executor or administrator, shall have the same effect and operation in law in every respect, and to all intents and purposes, as if such female were of the full age of twenty-one.—1829, *ch.* 216.

Powers of attorney from heirs, legatees, &c. may be acknowledged before the mayor of a corporation or notary public.

Sec. 1. *Be it enacted by the General Assembly of Maryland*, That all powers of attorney from any person or persons, who may have authority to execute the same which shall be acknowledged in this state before the mayor of a corporation, or notary public, or before any justice of the peace in this state, authorizing any person or persons to ask, demand or receive from any executor, administrator or guardian, or person who has been such, any portion, distributive share, legacy, sum of money or property whatsoever, or any part thereof, which is or shall be, or ought to be in possession of any such executor, administrator or guardian, or person who has been such, and which shall belong to, or be in any manner due to any heir, representative, distributee, legatee, or person who has been a ward: and all powers of attorney, from any person or persons who may have authority to execute the same, and which shall be acknowledged as aforesaid, authorizing any person or persons to sign, seal, make, execute or acknowledge any receipt, acquittance, release or final discharge for any such portion, distributive share, legacy, sum of money, or property as aforesaid, or any part thereof, shall be good and sufficient evidence in any court of this state, to prove the due execution or acknowledgment of any such power of attor-

Made valid.

May be recorded.

ney as aforesaid, and the same may be recorded in the office of the register of wills of the county in which the administration was granted, or in which the guardian was appointed or gave bond: *provided*, that before any such power of attorney, shall be so received in evidence, or recorded, if it be acknowledged before a mayor of a corporation, there shall be his certificate of the fact, under the seal of such corporation, or if it be acknowledged before a notary public, there shall be his certificate of the fact under his notarial seal; and if it be acknowledged before a justice of the peace, in any other county than that in which the administration was granted, or the guardian was appointed or gave bond, that there be also a certificate of the clerk of the county court, of the county in which such justice of the peace resides, under the seal of the said court, certifying to the fact of his being a justice of the peace, in and for such county at the time such acknowledgment was made.—1831, *ch.* 305.

Certificates required, however.

Sec. 2. *And be it enacted*, That all and every such powers of attorney as aforesaid, for any of the purposes aforesaid, which may be acknowledged any where out of this state before the mayor of a corporation, notary public, judge of any court of record, justice of the peace, or alderman, or before a consul-general, consul or vice-consul of the United States residing in a foreign country, shall be good and sufficient evidence in any court of this state, to prove the due execution or acknowledgment of any such power of attorney, and the same may be recorded in the office aforesaid: *provided*, *however*, that before any such power of attorney shall be so received in evidence or recorded, if it be acknowledged before the mayor of a corporation, there shall be his certificate of the fact under the seal of such corporation, or if it be acknowledged before a notary public, there shall be his certificate of the fact under his notarial seal, or if it be acknowledged before a judge of a court, there shall also be a certificate from the clerk of the court of which he is a judge, under the seal of such court, certifying to the facts that at the time such acknowledgment was made, the person before whom it was made was a judge of such court, and that such court was a court of record, or if it be acknowledged before a justice of the peace, then that there shall be a certificate under seal from the governor, chief magistrate, or clerk of a court of such state or country, as the case may be, certifying to the fact that the person before whom such acknowledgment was made, was at the time thereof, a justice of the peace, or if it be acknowledged before an alderman, that there shall be a certificate from the mayor of the corporation, under the seal of such corporation, or from a notary public, under his notarial seal, certifying to the fact, that the person before whom such acknowledgment was made, was at the time thereof, an alderman, or if it be acknowledged before a consul-general, consul or vice-consul as aforesaid, there shall also be a certificate of the fact, under the seal of such consul-general, consul or vice-consul as the case may be.—*Id.*

Acknowledgments of such taken out of the state.

Forms and certificates required.

Sec. 3. *And be it enacted*, That any receipt, acquittance, release, or final discharge from any heir, representative, distributee, or legatee, authorized to execute the same, or from any other

person authorized to execute the same to any guardian, executor or administrator, which shall have been acknowledged in this state, before the mayor of a corporation, notary public, register of wills, judge or justice of an orphans court, or judge of a county court, or any justice of the peace in this state, shall be good and sufficient evidence in any court in this state, to prove the due execution of any such receipt, acquittance, release or final discharge, and may be recorded in the office aforesaid: *Provided*, That if such receipt, acquittance, release or final discharge, be acknowledged in any other county than that in which the administration was granted, or the guardian was appointed or gave bond, then, and in that case, if it be acknowledged before a mayor of a corporation, there shall be his certificate of the fact, under the seal of such corporation, or if it be acknowledged before a notary public, there shall be his certificate of the fact, under his notarial seal, or if it be acknowledged before a register of wills, that there shall be a certificate from the presiding judge, or justice of the orphans court, of the county in which he is register of wills, certifying to the fact, that the person before whom such acknowledgment was made, was register of wills in and for that county, at the time such acknowledgment was made, or if it be acknowledged before a judge or justice of an orphans court, that there shall also be a certificate under the seal of office from the register of wills of the county in which such person may be a judge or justice of the orphans court, certifying to the fact that the person before whom such acknowledgment was made, was at the time of such acknowledgment, a judge or justice of the orphans court for such county, and if it be acknowledged before a judge of a county court or justice of the peace, that there shall also be a certificate from the clerk of the county court of the county in which such judge shall hold a court, or in which said justice of the peace resides, under the seal of the said court, certifying to the fact, that the party before whom such acknowledgment was made, was a judge of the county court of such county, or a justice of the peace in and for such county, as the case may be, at the time such acknowledgment was made.—*Id.*

Acquittances, receipts and final discharges from heirs, legatees, &c. made evidence.

Proviso.

Certificates, &c. required in such cases.

Sec. 4. *And be it enacted*, That any receipt, acquittance, release or final discharge from any person or persons, who may have authority to execute the same to any executor, administrator or guardian, or person who has been such, and which may be acknowledged any where out of this state, before the mayor of a corporation, notary public, judge of any court of record, justice of the peace, or alderman, or before a consul-general, consul or vice-consul of the United States, residing in a foreign country, shall be good and sufficient evidence in any court of this state to prove the due execution or acknowledgment of any such receipt, acquittance, release or final discharge, and the same may be recorded in the office aforesaid: *Provided however*, That if such receipt, acquittance, release or final discharge be acknowledged before a mayor of a corporation, there shall be his certificate of the fact under the seal of such corporation, or if it be acknowledged before a notary public, there shall be his certificate of the

Such instruments when executed out of this state, certificates, &c. required.

fact under his notarial seal, or if it be acknowledged before a judge of a court, there shall also be a certificate from the clerk of the court, of which he is judge, under the seal of such court, certifying to the facts, that at the time such acknowledgment was made, the person before whom it was made was a judge of such court, and that such court was a court of record, or if it be acknowledged before a justice of the peace, then that there shall be a certificate under seal from the governor, chief magistrate or clerk of a court, of such state or county, as the case may be, certifying to the fact, that the person before whom such acknowledgment was made, was at the time thereof a justice of the peace, or if it be acknowledged before an alderman, that there shall be a certificate from the mayor of the corporation, under the seal of such corporation, or from a notary public, under his notarial seal, certifying to the fact, that the person before whom such acknowledgment was made, was at the time thereof an alderman, or if it be acknowledged before a consul-general, consul or vice-consul as aforesaid, there shall also be a certificate of the fact under the seal of such consul-general, consul or vice-consul, as the case may be.—*Id.*

Such acts of females of 18 years made valid.

Sec. 5. *And be it enacted*, That all and every such power of attorney as aforesaid, for any of the purposes aforesaid, which may be executed by a female, of the age of eighteen years, and acknowledged according to the provisions of this act, shall be as good and valid to all intents and purposes, and shall have the same effect and operation in law, in every respect; as if such female was of the full age of twenty-one years.—*Id.*

As effectual as if before the orphans court.

Sec. 6. *And be it enacted*, That any receipt, acquittance, release or final discharge, acknowledged according to the provisions of this act, by any female of the age of eighteen years shall be good and valid to all intents and purposes, and shall have the same effect and operation in law, in every respect, as if the same was executed and acknowledged before any orphans court in this state, any law to the contrary notwithstanding.—*Id.*

Such instruments shall be recorded.

Sec. 7. *And be it enacted*, That any power of attorney, receipt, acquittance, release, or final discharge, executed or acknowledged according to the provisions of this act, may be recorded in the office of the register of wills of the county in which the guardian was appointed or gave bond, or in which the executor or administrator obtained letters testamentary, or of administration; and that a copy of any such power of attorney, receipt, acquittance, release, or final discharge acknowledged and recorded as aforesaid, duly attested under the seal of the office in which the same is recorded, shall, at all times hereafter, be admitted as evidence to prove such power of attorney, receipt, acquittance, release, or final discharge; but every such power of attorney, receipt, acquittance, release or final discharge, shall remain and be retained, and preserved in the office of such register of wills, and shall not be delivered to any person or persons whomsoever.—*Id.*

Copy made evidence.

CHAPTER XXXVIII.

TESTAMENTARY CAPACITY.*

The orphans courts are very frequently, on questions of admitting wills to probat, called on to decide on the testamentary capacity of a testator, without an opportunity of searching up and consulting authorities. To furnish them with the learning of distinguished civilians, and the doctrine of the American courts, I have not only collected in this chapter (from 'Shelford's recent treatise on idiots and lunatics,') the leading principles, but also incorporated the opinions of the courts of our sister states, (so far as I could collect them) on this subject. The opinion of the court of Appeals of Virginia, on the testamentary capacity of the late John Randolph, of Roanoke, is now given, I believe for the first time, to the profession.

Idiots, lunatics, and persons of unsound mind, are incapable of making wills of land or chattels by common law; and, by the (English) statute of wills, it is declared, that wills or testaments made of any lands or hereditaments by any idiot, or by any person *de non-sane memory*, shall not be taken to be good or effectual in the law.

Every person is presumed to be of sound mind until the contrary is proved; therefore, it is incumbent on the party attempting to defeat a will on the ground of the testator's insanity, to prove the existence of such disability.

It was observed by Sir *John Nicholl* in a recent case, that it is a great, but not uncommon error, to suppose, that because a person can understand a question put to him, and can give a rational answer to such question, he is of perfect sound mind, and is capable of making a will for any purpose whatever, whereas the rule of law, and it is the rule of common sense, is far otherwise; the competency of mind must be judged of by the nature of the act to be done, and from a consideration of all the circumstances of the case. In *Combe's* case, it was agreed by the judges, 'that the sane memory for the making a will is not at all times when the party can answer to any thing with sense, but he ought to have judgment to discern and to be of perfect memory, otherwise the will is void.' And again, according to Lord *Coke*, 'it is not sufficient that the testator have a memory, when he makes his will, to answer familiar and usual questions, but he ought to have a disposing memory, so that he is able to make a disposition of his lands with understanding and reason; and that is such a memory as the law calls sane and perfect.'

In one case it was laid down, that, although a man have a mind of sufficient soundness and discretion to regulate his affairs in general, yet, if such a dominion or influence be obtained over him as to prevent his exercising such a discretion in the making of his will, he could not be considered as having such a disposing mind as would give effect to it, although the evidence to establish such a case was not determined; and that it was not necessary to go so far as to make a man absolutely insane, so as to be an object for a commission of lunacy, in order to determine the question whether the testator was of sound and disposing memory and understanding; a man perhaps might not be insane, and yet not equal to the important act of disposing of his property by will.

If the party relying upon the testator's insanity, prove its existence before the making of the will in question, the law will presume the continuance of the disorder at the time of making such will, until the contrary be shewn,

* This chapter ought, in due arrangement, to have immediately succeeded title 'Wills.' I was induced to postpone it, under the hope of being enabled to incorporate a report of the trials growing out of the wills of the late honourable John Randolph, of Roanoke. Mr. Cooke, now of the Baltimore bar, who was one of the counsel engaged in those trials, has (very recently,) kindly loaned me the records thereof. The testimony is too voluminous to be incorporated in a work of this character. It is my intention to make a report of this case, as soon as my judicial duties will permit.

unless, indeed, the attack was only of a slight nature, of short duration, or owing to some accidental cause which had been removed, or a long period had elapsed since the commencement of such temporary disorder, and making of the will.

Although an idiot is incapable of making a will, yet, he that is only of a mean capacity or understanding, or one who is, as it were, between a man of ordinary capacity and an idiot, is not prohibited from making a will or testament, if he has sufficient understanding to comprehend its nature and effect. If an idiot make a will, reasonable and wise in itself, it will not be valid; for the presumption of law is against the validity of all the legal acts of an idiot; but if it be shewn, that a rational will proceeded from, and was dictated by, a person commonly reputed to be an idiot, it would be strong evidence to prove that he was not so.

An old man, become childish, and so forgetful as not to remember his own name, cannot make a will; neither can a drunkard, who, by excessive intoxication, is deprived of the use of his understanding and reason. Intoxication is in truth temporary insanity: the brain is incapable of performing its proper functions; there is temporary mania; but that species of derangement, when the exciting cause is removed, ceases, and sobriety brings with it a return of reason.

But where no fixed and settled delusion is shown, and consequently, no decided insanity, and an extravagant act of a party can be accounted for by the excitement of liquor, while at all other times his mind was sound; in order to avoid a will made by him, it must be proved that he was so excited by liquor, or so conducted himself during the particular act, as to be at that moment legally disqualified from giving effect to it.

A testator must have perfect ability and capacity in point of discretion and understanding, as a rational man, at the time of making his will; for, if a man be *non compos mentis* at the time of making it, though he afterwards become a man of sound judgment and memory, yet the will is void, because he wanted the disposing power at the time of its inception. If a man of sound mind makes his will, and afterwards becomes *non compos mentis*, he cannot revoke it during the continuance of such disability; and a subsequent loss of intellect is no revocation. For supporting the validity of the will, notwithstanding the subsequent incapacity of the testator, the rule of the common law is conformable to the civil.

It may be observed that a large portion of evidence as to capacity, is evidence of mere opinion; and upon matters of opinion mankind differ even to a proverb. In the next place, there is no *fixed* standard by which each witness forms his opinion of capacity; one person seeing a testator in extreme age or under extreme sickness, thinks, that if he knows those about him, and can answer an ordinary question with respect to the state of his illness, or of his wants, such and similar matters render him capable of giving effect to a disposition by will, however complicated it may be, by the mere formal execution of the instrument; while another person may be of opinion, that though a testator, in the ordinary management of his affairs, can hold reasonable conversation, can fully comprehend all the usual and simple transactions of life, yet, if he is unable to take the active management of all his concerns, however involved those concerns may be, or if he is liable to become confused by entering into intricate transactions, he is totally incapable, and cannot enter into a testamentary disposition, however plain and simple it may be. Now, where opinions are formed by such different standards, it is obvious that much contrariety will occur. Sir *John Nicholl* observed, that experience in the Ecclesiastical court teaches us, that evidence upon questions of capacity is almost always contradictory, such evidence being commonly that of opinion merely; and the contrariety proceeds from the obvious grounds, that of the witnesses, no two, possibly, have seen the party whose state is deposed to, at precisely the same time, and under precisely the same circumstances; and that each, again, of the several witnesses, however numerous, measures, possibly, testamentary capacity by his own particular standard. These sources of discrepancy, and many more might be enumerated, are common to all cases of this description. There is an additional source, when the transaction of which they have to speak is remote, a circumstance sufficient in itself to account for a no inconsiderable

degree of contrariety of evidence, even where the witnesses have to speak of *facts* merely, and not to opinions formed, and inference built upon facts, of which most of the evidence furnished on questions of capacity is commonly made up. If the court, therefore, on questions of capacity, generally, is accustomed to rely but little on such evidence, so far as it is that of *mere* opinion, but to form its own judgment from the facts and the conduct of the parties at the time—it becomes it to do so, more peculiarly where much of the evidence not merely consists of opinions delivered long subsequently to the transactions which they profess to have suggested them—upon loose recollections too, and after repeated discussions of the subject matter with interested parties.

In a case where there was great conflict of opinion amongst the witnesses as to the capability of a testator, some being of opinion that he was decidedly incapable; some, that his capacity was in no degree affected; others, that, though capable, his mind was shaken—Sir *John Nicholl* said, the just result is, that the testator's faculties were in a degree damaged and deteriorated, but that he was not intestable; that his capacity was so far impaired and fluctuating, that the court would require not only the mere fact of execution, but also satisfactory evidence of instructions, and proof of volition and intention.

The criterion by which the capacity of a testator is to be examined, especially where there is much contradictory evidence, can only be drawn from his acts. The mere opinions of witnesses on this point, being drawn from very different standards, are of little weight, and must fluctuate, from their different abilities to form an opinion, from their different opportunities of seeing the person, and from the different condition of the testator's mind or humour at different times. Thus, the capacity of a testator of a very advanced age, and subject to occasional incapacity from violent nervous attacks, was established on the proof of acts inferring his general possession of reason, notwithstanding much conflicting evidence of witnesses. Lord *Redesdale* seems to have expressed an opinion, that a person might be capable of making a codicil to his will, though not of doing any thing which requires deliberation, as a bargain.

The manner in which a will has been written and executed, and the contents of the will itself, coupled with the situation of the testator, and the circumstances under which it was made, afford important evidence as to his capacity. And it seems, that, from such evidence alone, where the terms of the supposed will are such as tend to exclude the supposition of the maker's sanity, the jury may decide against the validity of the will. But it is clear, on the other hand, that it is not sufficient to show that the dispositions of the will are imprudent and unaccountable. It was said by Lord *Eldon*, that subsequent papers written by a testator, though evidence of his competence, are regarded with considerable jealousy. There are cases of wills being established, which were made during the intervals of delirium, because they have contained internal evidence of their being reasonable, and such as a man in his senses may be supposed to have made. So, the question must depend materially upon the will itself, the circumstance of its attestation, and its reasonableness, which may be such as to establish the will without any dispute.

In one case, where it was admitted that, according to the coroner's inquest, the testator must be taken to have been insane at the time he committed an act, in consequence of which he died—it was said, that it did not follow that he continued insane during the whole interval from the commission of that act to his death, or that he was so at the time of making his will.

And in one case, where there was no evidence of the deceased's insanity at the time of or prior to instructions for his will, the commission of suicide, three days afterwards, was held not to invalidate the paper by raising an inference of previous derangement.

And in another case, where the attesting witnesses to a will, disinterested medical men, gave evidence strongly in favour of the testator's sanity, the Ecclesiastical court would not set aside the will on proof by interrogatories, without plea, that the deceased, many years before, had been under an insane delusion.

Where clear, decided, and undoubted insanity has been established to have once existed before the contested transactions, acts otherwise of a doubtful character may become of more force in proof of its existence at the time in question, than if no previous derangement had appeared. Even acts decidedly of an insane character, occurring after the transaction, may reflect back upon acts otherwise equivocal, about the time of the transaction itself, or on the general deportment of the party; but, where there are no decided acts proved ever to have taken place, when all the acts are equivocal, when they may be attributed to other causes, to violent passion, to intoxication, operating upon a mind naturally excitable—it does not appear that, in any case, such equivocal acts, however numerous, have been held to establish insanity.

Non compos mentis is a common law disability, with respect to every disposition of property, and, consequently, what shall be considered a sound and perfect memory at the time of devising lands, is a question determinable at common law.

A court of law will not set aside a will on the ground of *non compos mentis*, if the party knew perfectly what he was doing when it was made. The widow of Mr. Bennett claimed the whole of her husband's property under his will. Bennett had been greatly debilitated in mind and body by habits of debauchery, and the woman effected her marriage with him by getting into lodgings opposite to him at Bath; she obtained a great degree of influence over him; and, immediately after the marriage, turned away all his old servants. Lord *Thurlow* was much against the will, and two issues were directed as to its validity, in both of which it was established. Lord Chief Justice *Eyre*, before whom it was tried, stated to the jury that the point was, whether the testator knew *perfectly what he was doing*, and that they were not to enter too minutely into considerations of influence.

To prevent the frauds consequent upon the secret manner in which wills were formerly executed, the statute of frauds requires every will disposing of real estate to be in writing, and signed by the devisor, and attested and subscribed in his presence, by three credible witnesses. In the construction of this statute, therefore, it has been holden, that the legislature, when it required the witnesses to attest the signing, must, by implication, have required them to attest the capacity of signing; for, it was not merely the abstract act or form of signing which the legislature intended as one necessary solemnity to the constitution of a devise, for, an idiot or a lunatic might put his name to an instrument, and yet be perfectly ignorant of its contents; but the legislature, in the word *'signing,'* comprehended another idea, namely, signing an instrument, intending it to be a will; consequently, the mental power or capacity of willing was necessary, as well as the corporal power of putting the mark or name to constitute a signing. The business, then, of the persons required by the statute to be present at executing a will, is not barely to attest the corporal act of signing, but to try, judge, and determine, whether the testator is *compos* to sign; sanity is the great fact which the witness has to speak to, when he comes to prove the attestation. It is not sufficient that the testator be corporally present when he signs his will, if, in truth, he be in a state of insensibility, and consequently, absent as to mental purposes. The execution of a will, disposing of real estate, is to be proved by the subscribing witnesses, if they are alive, and can be produced. On a trial at common law, all the circumstances may be proved by a single witness, provided there were actually three witnesses, as the statute of fraud requires. But, though the devisee need not call more than one witness, the opposite party may call the other subscribing witnesses. Should one of the witnesses refuse to swear that he saw the testator publish his will, if that fact can be proved by other sufficient testimony, the fraud of the obstinate witness will not be sufficient to defeat the testator's will.

A person who signs his name as witness to a will, by this act of attestation solemnly testifies the sanity of the testator. Should such witness afterwards attempt to impeach his own act, and to prove that the testator did not know what he was doing when he made (what purported to be) his will, though such testimony will be far indeed from conclusive, and Lord *Mansfield* even held, that a witness impeaching his own acts, instead of finding credit, deserved the pillory—yet, Lord *Eldon* has not gone so far in exclusion

of such evidence, admitting, however, that it is to be received with the most scrupulous jealousy. Sir *John Nicholl* has perhaps laid down the most distinct rule, namely, that such testimony is not to be positively rejected; but, at the same time, no fact stated by a witness open to such just suspicion can be relied on, where he is not corroborated by other evidence. In a case pregnant with appearances of fraud, and resting for support on the attesting witnesses alone, these witnesses must be beyond suspicion; if at all shaken in credit, no part of their evidence can be relied on. It is possible, that a testamentary instrument may be established against the evidence of all the subscribing witnesses; but such a case would require strong supplementary circumstances—would require to be supported by the whole *res gestæ*, by strong probability arising from the conduct of all parties, and by the improbability of the practice of any fraud or circumvention, or the exercise of undue influence. And it has been lately decided, that a will may be pronounced for, though both the attesting witnesses depose to the incapacity of the deceased. The issue *devisavit vel non* always implies in it, where the execution is not the point in issue, a question of the capacity of the testator; that is, either his absolute capacity, or his relative capacity, where it is supposed that the particular instrument was the effect of that undue influence, which necessarily implies a degree of weakness at the time, and *quoad* that instrument, making it not an instrument arising from the fair bias of his own mind, but from the exercise of that improper influence.

All acts done during a *lucid interval* are to be considered as those of a person perfectly capable of contracting, managing, and disposing of his affairs at that period, and this rule applies to *wills* as well as contracts. This has more frequently occurred upon wills. A number of questions has been raised upon the execution of a will during a lucid interval, and that being proved, the will has been held valid and effectual to all intents and purposes, for the conveyance of real and personal estate, as if the testator had never been deranged.

Where general lunacy has been established, the parties alleging a lucid interval are under the necessity of shewing that there was not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind sufficient to enable the alleged lunatic to judge of the act he has performed. Lord *Thurlow* is reported to have said, that, 'by a perfect *interval*, he did not mean a cooler moment, an abatement of pain or violence, or of a higher state of torture, a mind relieved from excessive pressure—but an interval in which the mind, having thrown off the disease, had recovered its general habit.'

Every person is presumed to be sane, until it is shewn that he has become insane; the presumption then changes; it is presumed that he continues of unsound mind, and the party setting up any instrument after insanity has manifested itself, has the burthen of proof cast upon him; he must shew recovery, and he must shew, not merely that the party whose act is the subject of inquiry was restored to a state of calmness, and to the ability of holding rational conversation on some topics, but that his mind, having shaken off the disease, was again become perfect, was sound upon all subjects, and that no delusion remained.

If a will made by a lunatic is rationally drawn up, and the nature of the disorder was such as to afford any reasonable ground to suppose that a lucid interval may have prevailed; the act itself furnishes a very strong presumption of that sound and disposing mind which is necessary to its validity.

What fell from the late Sir *William Wynne* in his judgment in the case of *Cartwright vs. Cartwright* and others, before the delegates, on an appeal from the prerogative court of the Archbishop of Canterbury, expounds the law upon this point with great clearness and precision. There, the testatrix wrote her will without any collateral circumstances to indicate the fact of a lucid interval, and with her own hands, loosened from their ligatures for the purpose; she was alone while she performed the act, though observed through an aperture by persons in an adjoining room, who deposed, that, while engaged in doing it, she frequently left off writing, threw the torn pieces of paper into the fire, and walked about the room in a wild and disordered manner. But the paper itself had no mark of irritation; whatever outward appearance of disorder there might have been, it had no effect upon

the writing itself, which was a perfectly steady and correct performance, entirely consistent with her attachments, impressions, and habits, when in a sane condition, and written without a single mistake or blot. The will was planned and completed by the testatrix without any assistance, and afterwards recognized by her. Upon this state of the case, Sir *William Wynne* decided for the validity of the will, grounding his judgment on the following principles:—

The rule of the law of England on this subject is the same as that of the civil law. 'If it can be established that the party afflicted habitually by a malady of the mind has intermissions, and if there was an intermission of the disorder at the time of the act, that being proved is sufficient, and the general habitual insanity will not affect it; but the effect of it is this, it inverts the order of proof and of presumption; for, until proof of habitual insanity is made, the presumption is, that the agent, like all human creatures, was rational: but where an habitual insanity in the mind of the person who does the act is established, there the party who would take advantage of the fact of an interval of reason must prove it—that is the law; so that in all these cases the question is, whether admitting habitual insanity, there was a lucid interval or not to do the act. The strongest and best proof that can arise as to a lucid interval is that which arises from the act itself, which is the thing to be first examined, and if it can be proved and established that it is a rational act rationally done, that is sufficient.' The rule upon this subject is thus laid down by *Swinburne*, 'if a lunatic person, or one that is beside himself at some times, but not continually, make his testament, and it is not known whether the same were made while he was of sound mind and memory or no, then, in case the testament be so conceived as thereby no argument of phrenzy or folly can be gathered, it is to be presumed that the same was made during the time of his calm and clear intermissions, and so the testament shall be adjudged good; yea, although it cannot be proved that the testator used to have any clear and quiet intermissions at all; yet nevertheless, if the testament be wisely and orderly framed, the same ought to be accepted for a lawful testament.' 'Unquestionably,' continued *Sir W. Wynne*, 'there must be complete and absolute proof that the party who had so framed it, did it without any assistance. If the fact be that he has done as rational an act as can be, without any assistance from another person, nothing more is necessary to be proved. There does not appear to be any authority or law to prove what the length of the lucid interval is to be, whether an hour, a day, or a month; all that is required is, that it should be of sufficient length to do the rational act intended; if it is established that the act done is perfectly proper, and that the party who is alleged to have done it was free from the disorder at the time, that is completely sufficient.'

But, propriety of expression will not alone suffice to establish a will, if other circumstances in proof, added to the nature of the bequests, should raise a presumption that it originated in insanity. Thus, in the case of *Clarke vs. Lear* and *Scarwell*, the testator, a middle aged man, being a lunatic, escaped from his keeper, and at a watering place fell in love with a young lady, to whom he afterwards sent in very polite terms a present of a lottery ticket, and making a will, rational on the face of it, left her a legacy of £1,000. But, though it was argued that all this had the appearance of reason, the will was set aside as bottomed in insanity.

There are many circumstances which, though not of themselves enough to establish actual insanity, where it had not before become decided, are still strong *indicia* of its continuance—such as great irritability, violent passions, occasionally deep depression, eccentric habits, suspiciousness, inconsistency, changeableness, and the like. If actual insanity has never existed, many, or most of these circumstances may occur, and yet not establish positive derangement: but where actual derangement has previously existed, lighter things become confirmations.

It may be difficult, and perhaps would be dangerous, to attempt to define what is the essence of insanity. Delusion has been generally laid down as essential; that is, the fancying things to exist which can have no existence, and are impossible according to the nature of things, as that trees will walk, or statues nod, and which fancy no proof or reasoning will remove. An opinion against rational probability is not necessarily an insane opinion; it

is not drawing right conclusions from manifestly wrong premises, but erroneous inferences from premises which may be true. Others may have said, that insanity may exist though no delusion prevail; whether this means that it may exist where no delusion ever has prevailed, or only where it cannot be called forth upon the particular occasion, is not so clear. *Sir J. Nicholl* said, 'that no case had ever come under his notice where insanity had been held to be established without any delusion ever having prevailed, nor was he able exactly to understand what is meant by '*a lucid interval*,' if it did not take place when no symptom of delusion can be called forth at the time. How, but by the manifestation of the delusion, is the insanity proved to exist at any one time? The disorder may not be permanently and altogether eradicated—it may only intermit—it may be liable to return; but if the mind is apparently rational upon all subjects, and no symptom of delusion can be called forth on any subject, the disorder is for that time absent; there is then an interval, if there be any such thing as a lucid interval. It may often be difficult to prove a lucid interval, because it is difficult to ascertain the total absence of all delusion.'

In a case where the deceased was admitted to have been insane before the execution of two asserted wills, and where there was evidence of delusion and other *indicia* of derangement existing shortly before, as well as subsequent to the acts, proof of calmness, and of his doing formal matters of business, under the sanction of his family, were held not sufficient to rebut the presumption against such wills.

In a case where delirium, as contradistinguished from fixed mental derangement or permanent proper insanity, was set up in opposition to a will, it was observed by *Sir John Nicholl*, 'that the two cases, however similar in some respects, are still distinguished from each other in several particulars; and in no one particular more than in the greater comparative facility of proving a *lucid interval* in the one than in the other case. For, in cases of permanent proper insanity, the proof of a lucid interval is matter of extreme difficulty, because the patient so affected, is not unfrequently, rational to all outward appearance, without any real abatement of his malady; so that, in truth and substance, he is quite as insane in his apparently rational, as he is in his visible raving fits. But the apparently rational intervals of persons merely delirious, for the most part are really such. Delirium is a fluctuating state of mind, created by temporary excitement; in the absence of which, to be ascertained by the appearance of the patient, the patient is most commonly really sane. Hence, as also indeed from their greater presumed frequency, in most instances in cases of delirium, the probabilities, *a priori*, in favour of a lucid interval, are infinitely stronger in a case of delirium, than in one of permanent proper insanity; and the difficulty of proving a lucid interval is less, in the same exact proportion, in the former, than it is in the latter case, and has always been so held by the ecclesiastical court.' The antecedent declarations of a party with respect to his intention in making a disposition by will, have been allowed weight in favour of the presumption of a lucid interval. Thus, in a case where a person, having a large family, made his will whilst resident in a receptacle for deranged persons, and provided for the respective branches of his family, for whom he had at several periods made different provisions. Among other respectable persons with whom he was acquainted was a bank director, to whom he had, previous to the commencement of his calamity stated the provisions he had made, and what he intended to do further for the different branches of his family. The question was, whether a will made in that house was made during a lucid interval. He was at that time as competent to converse upon the subject of testamentary dispositions as he was before; he had the same objects and purposes: and, upon the state of his mind compared with his antecedent declarations, his will was established. And it seems that a will of personalty only, conformable to a long entertained intention, prepared two months before, and the execution whereof was merely delayed for want of witnesses, would be valid as an unexecuted paper, even though the execution finally took place during supervening insanity.

Proof of the existence of *partial insanity* will invalidate contracts generally, and will be sufficient to defeat a will, the direct offspring of that partial insanity, both in the courts of common law, and in the ecclesiastical courts;

although the testator at the time of making it was sane in other respects, upon ordinary subjects.

The following decisions have occurred upon cases of this description. The first is that of Mr. Greenwood, who was bred to the bar, and acted as chairman at the quarter sessions, but becoming diseased, and receiving in a fever a draught from the hands of his brother, the delirium taking its ground then, connected itself with that idea; and he considered his brother as having given him a potion with a view to destroy him. He recovered in all other respects, but that morbid image never departed, and that idea appeared connected with the will, by which he disinherited his brother. Nevertheless, it was considered so necessary to have some precise rule, that though a verdict had been obtained in the court of common pleas against the will, the judge strongly advised the jury on a second trial, to find the other way; and they did accordingly find in favour of the will. Further proceedings took place afterwards, and concluded in a compromise.

The principal object of inquiry in the recent case of *Dew vs. Clark and Clark*, was the cause and grounds of the testator's impressions and feelings respecting his daughter, as to whom it was said he laboured under delusions; and the consideration whether those impressions were founded on realities, accounting for his acts of severity, or were the offspring of a disordered mind; and whether his conduct towards his daughter was accompanied by any other circumstances tending to show insanity.

The ground on which the will was opposed, was not a denial of the instructions and execution, nor a suggestion of any fraud or circumvention, nor of any intrinsic influence; and it was not alleged, that the will did not originate with himself, nor that it was not prepared and completed by his direction, nor that the attesting witnesses had misrepresented the facts, nor that they had not given an honest opinion of the state of the deceased; but the ground was, that, though the will was the mind of the deceased, yet that it was not a sound, but an unsound mind—unsound in the legal acceptation of the epithet—'deranged and insane.' The general outline of the plea on behalf of the daughter was, that the deceased showed strong marks of derangement towards his first wife, and at the birth of this daughter; that, towards the daughter he showed great antipathy and hatred; that, in respect to her, he laboured under great delusion of mind; declared that she was invested by nature with singular depravity; was an abandoned profligate, vile, and irreclaimable; that he treated her with the greatest cruelty and violence, notwithstanding she was dutiful and virtuous; that, in various other respects, he exhibited marks of insanity: the admission of this plea, which was very long and detailed, was opposed; and the court was of opinion, that it disclosed a case difficult of proof; but that, if proved, it would be available. In answer, a long plea was also given in support of the will; pleading the general sanity of the deceased in the whole of his conduct; pleading his character, temper, and religious principles, as accounting for harshness towards his daughter; and alleging such misconduct in the daughter as afforded rational grounds for severity during her education, and for displeasure afterwards; such as showed that he acted not under derangement, but on facts which he considered as justifying his resentment.

Sir John Nicholl observed—'In this case, there is evidence to shew, that the deceased in the ordinary transactions of life, conducted himself and his affairs rationally; was a sensible, clever man; amassed a considerable fortune by his profession; took great care of his property; and that several of his friends and acquaintance, some of them medical persons, never considered, or even suspected, that he was deranged in his mind: all this is fully established, and strengthened the presumption of sanity, and requires that the proof of derangement should be very forcible and stringent; but, it is not conclusive, nor is it even conflicting evidence. All this may be true, and yet delusion on particular subjects, and shewing itself on particular occasions, might exist.' And after going through the principal evidence, he said, 'in this case, the main delusions, certainly, are those respecting his daughter and respecting himself; so that, though his daughter, from her earliest infancy to the end of her history in this case, is proved to be amiable in disposition, of superior natural talents, engaging in her manners, diligent, industrious, submissive, and obedient, patient under affliction, dutiful and affectionate, modest

and virtuous, moral and religious, yet, in the deluded mind of the deceased, she is the most extraordinary instance of depravity, of vileness, of vice, of crime, of profligacy, of hypocrisy, of artifice, of disobedience, of revolt and rebellion against paternal authority, and is quite irreclaimable—while, in regard to himself, he is a pattern of fatherly tenderness and affection, though tying his daughter to a bed-post, and flogging her with the most unmerciful severity, and aggravating her sufferings by other acts of cruelty, and compeling her to perform the most menial drudgery, and of the severest sort, to which even a servant would not submit. All these things are represented by himself as proofs of his great tenderness and regard. . These impressions accompany him through life, and are recorded in this will. To remove these delusions, no reasoning, no argument, no interposition of friends, no pastoral authority, is of any avail: even the sanction of religion cannot convince him that his ideas are erroneous, nor induce him to alter his conduct; he held himself perfect and faultless—'pure as the Deity.' What might be the condition of the deceased as applied to other transactions, civil or criminal, it is not my duty to consider.' The learned judge in conclusion said, it was his duty conscientiously to decide this case upon his own moral conviction, founded on the evidence respecting the will, carefully guarding himself from being misled by feelings of compassion: and it was his full conviction, that the deceased when he made this will, was not a person of sound mind; or, in Lord Coke's language was '*non compos mentis*.' He therefore pronounced against the validity of the will.

It was held, in a recent case, that a testamentary paper cannot be set aside on the ground of *monomania*, unless there be the most decisive evidence, that at the time of the *factum* of the paper, the belief in the testator's mind amounted to insane delusion. The testator had been a Fellow of Queen's College, Oxford, and for the last twenty years of his life, rector of a living belonging to that college: he was always eccentric in his habits, resided in the rectory house, and was latterly very retired. His sister had two daughters, one of whom married Harrison, a farmer, who lived in the testator's parish, collected his tithes, and was appointed his church-warden. In consequence of the testator and his two servants having been all taken ill together, with a complaint in the bowels and vomiting, he believed that an attempt had been made to poison him. It appeared, that he had declared that the well belonging to his house had been poisoned by an infusion of poisonous matter, and that he subsequently thought that the eggs, butter, and milk sent by Harrison, were poisoned; which belief continued to his death. The testator, advised by his solicitors and a medical man, who thought at the time that he had rational grounds for his suspicions, caused several investigations to be made, for the purpose of ascertaining whether any attempt to poison him had been made; and the gentlemen who conducted them were satisfied that there had been none. The papers propounded as the will and codicil were prepared and executed subsequently to the time when the testator was impressed with the belief of the poison, and bequeathed nearly the whole of his large property to the Provost and Fellows of Queen's College, Oxford, for charitable purposes, for the benefit of the poor of the parish in which he resided; but it appeared that they carried into effect an intention which had been expressed long before he had the notion about poison, and which had been delayed merely for the purpose of getting witnesses. The will was all in the testator's hand-writing, was remarkably well written, without alteration or erasure, and bore no appearance of excitement or hurry, was attested by two clergymen, one his curate, the other the minister of an adjoining parish, who both in the most unhesitating manner deposed to their full belief that the testator was of perfect sound mind, notwithstanding, at the time of their examination, they were aware of his opinions respecting poisoning; and this testimony was corroborated by that of the solicitors and medical man of the testator. The testamentary papers were opposed by the next of kin, on the ground that they were prepared and executed when the testator was impressed with the belief of poisoning, and while he was of unsound mind and under mental delusion. *Sir John Nicholl* said, 'that at all events, it was a case of *monomania:* for, upon every other subject, from the time in question to his death, the deceased acted as a person of sound mind, as much as he had ever been; he managed his house, his property, and his farm, granted leases, received

tithes, kept accounts, recognized his will, held rational conversation, and did church duty. A *monomania,* to affect such an instrument, under such circumstances, should be clear in point of existence, and decided in character beyond all doubt. That the deceased thought and believed that an attempt had been made to poison him, seemed to be a fact established; but was it proved that his opinion in that respect was a mere morbid insane delusion, rendering him intestable? The question was not, whether the attempt to poison was really made, but whether he had grounds for suspecting it? or whether, as pleaded, 'the deceased had no rational grounds whatever for his belief?'' The court pronounced in favour of the will and two other papers.

When the mind of a dying person is reduced by the stress of his malady, or by general exhaustion, to such a state of mental depression and debility as to be incapable of a determinate testamentary act, a paper signed by him under such circumstances, as a codicil to his will, will be rejected by the ecclesiastical court, especially if such instrument contains internal evidence of intellectual weakness, and disturbs the settlement of the testator's affairs by a former well-considered will made by him when in the entire possession of his mental powers.

Mental incapacity may invalidate only part of a will; as in a recent case where a testator wrote the first part of what was propounded as his will with his own hand, but the concluding part was written by the executor, who was principally benefitted, and who was the active agent in bringing the witnesses to it to the house of the deceased. According to the evidence, the deceased was so worn out that he could not complete his will, but there was no proof of any actual incapacity which could be set against his writing his intentions sensibly and intelligibly to a certain extent. It appeared, however, that after this effort, his capacity was not so alive as to prevent him from executing an instrument of the contents of which he was not aware; and it was not in evidence that he gave any instructions for the part of the paper which was written for him, or that it was read over to him after it was written. The court pronounced against the part of the will as to the appointment of the executor and residuary legatee, but in favour of the part written by the testator himself.

Where a will is partially defaced by a testator whilst of unsound mind, it is to be pronounced for as it existed in its integral state, if that can be ascertained

Besides insanity, properly so called, a species of insanity, the mere effect of drunkenness and excitement from spirituous and other intoxicating liquors, has sometimes been set up for the purpose of defeating an alleged will. It has, however, been very justly observed, that whatever resemblance there may be in the conduct and actions of a man under such excitement, and those of a person properly insane, 'their apparent similarity are subject to very different considerations.' Where actual insanity has once shown itself, either perfect recovery, or at least a lucid interval at the time of making, must be clearly proved, to entitle an alleged testamentary paper to be pronounced for as a valid will. Either of these, however, the last especially, is highly difficult of proof, for this reason—that insanity will often exist, though *latent;* so that a person may in effect be completely mad or insane on some subjects, and in some parts of his conduct apparently rational; but the effects of drunkenness *only subsist,* whilst the cause, the excitement visibly lasts: there can scarcely be such a thing as latent ebriety; so that a case of incapacity from mere drunkenness, and yet the man being capable to all outward appearance, can hardly arise. Consequently, in cases of this description, all which is required to be shewn is, the absence of such excitement at the time of the act done, as would vitiate it: for, under a slight degree of excitement from liquor, the memory and understanding may be as correct as in the total absence of any exciting cause.—*Law Library, vol. 2, page 174 to 194.*

AMERICAN AUTHORITIES.

The testimony of attesting witnesses is most to be regarded. *Harrison vs. Rowen*, 3 *Was. C. C. Rep.* 580.

Opinions, without facts to support them, are of little weight, unless they are the opinions of medical men, upon the symptoms proved, and that of the attending physicians is in general entitled to the most respect.—*Id.*

It should appear that the testator had a sound and disposing mind and memory, that is, that he was capable of making his will with an understanding of what he was doing, a recollection of the property intended to be disposed of, of the objects of his bounty and the manner of distributing his property.—*Id.* *Lessee of Hoge vs. Fisher and others*, 1 *Peters' Cir. Court Rep.* 163.

It is not necessary that he should view it in its legal form or comprehend it in that way; it is enough that he understands the elements of which it is composed, the disposition of them in their simple forms.—*Id.*

The testator should be able to make intelligible to the scrivener the dictates of his mind. It is the soundness of the mind, not of the body which is to be regarded.—*Id.*

The mental soundness is to be judged of by his conversations and actions at the time, or from both. It is not necessary that he should be able to answer ordinary questions in a suitable manner, or describe his feelings accurately.—*Id.*

The question is, competency when the will was made, and evidence of acts and sayings, both before and after, is always admitted.—*Id.*

In the case of *Stevens and wife vs. Vancleve*, 4 *Was. C. C. Rep.* 266, Mr. Justice Washington instructs the jury in the following manner: 'As to the testator's competency to make a will, he must in the language of the law, be possessed of a sound and disposing mind and memory. He must have memory. A man in whose mind this faculty is totally extinguished, cannot be said to possess understanding to any degree whatever, or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease. He may not at all times be able to recollect the names, persons or families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had been before asked and answered; and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigour of intellect to make and digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject of which he may have possibly often thought, and there is no person probably who has not arranged such a disposition in his mind before he committed it to writing. More especially in such a reduced state of mind and memory he may be able to recollect and understand the disposition of his property, which he had made by a former will, when the same is distinctly read over to him. The question is not so much what was the degree of memory possessed by the testator, as this, had he a disposing memory? Was he capable of recollecting the property he was about to bequeath, the manner of distributing it, and the objects of his bounty? To sum up the whole in the most intelligent and simple form, were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time when he executed his will? The only point to be looked at by the jury, at which the capacity of the testator is to be tested is, that when the will was executed. He may have been incapable of making a will at any time before or after that period, and the law permits evidence of such prior or subsequent incapacity to be given. But unless it bear upon that period and is of such a nature as to show incompetency when the will was executed it amounts to nothing. This being the important epoch, the evidence of the attesting witnesses, and next to them those who were present at the execution, all other things being equal, is most to be relied on. The reason is an obvious one. The law considers the attesting witnesses to be called on in particular, by duty, to examine into, and to be satisfied of the

capacity of the testator to make a will. There are few men so ignorant as not to know that a person *non compos mentis*, cannot make a valid disposition of his property by will, and that his signature to the will attests not only its execution, but its validity. These witnesses beside and others present at the execution, have a better opportunity of judging of the soundness of the testator's mind, from his words, action and appearance, than those who merely saw him at other times.

MEADE VS. BRYAN—OPINION OF COURT OF APPEALS OF VIRGINIA.

This is a question of probat. The will of the late John Randolph, dated 1st January, 1832, being offered for proof in the general court, was opposed on the ground that he was of unsound mind at the making of the will. The general court, consisting of eleven judges, decided by a majority of one, in favour of the will; and the appeal is from this decision. The case is of great importance, both for the principles and the property involved; it is also a case of much difficulty: the discussion at the bar has been altogether worthy of the cause, and for myself, I have only to lament that the near approach of the end of our session, has cut us off from all chance of devoting to its investigation the time and labour necessary to understand it perfectly, and to set forth intelligibly the grounds of our opinions. It was thought better, however, that we should decide it now, than by taking further time, leaving this immense property six months longer in its present condition. The will was wholly written by the testator, and the sole question is, was he of sound mind? Our investigation of the law and the facts, has brought us to the conclusion that he was *not*—and, as instructed by my brethren, I will assign, as briefly and clearly as the hurry of the moment will permit, the reasons for our opinion.

It is clear, that sanity must be presumed till the contrary is shown. Every one, therefore, who impeaches the validity of a will on account of the supposed incapacity of the testator, must establish such incapacity by clear and satisfactory proofs. 'It may be difficult,' says *Sir John Nicholl*, 5 *Eccl. Rep.* 223, *Wheeler vs. Alderson*, 'perhaps would be dangerous, to attempt to define what is the essence of insanity. Delusion has been generally laid down as essential; that is, the fancying things to exist which have no existence, and which fancy no proof of reasoning will remove.'

If this state of mind be established, or admitted to have existed at any particular period, but a lucid interval be alleged, then the burthen of proof attaches to the party alleging the lucid interval. *Attorney general vs. Parnther*, 3 *Bro. C. C.* 441. *White vs. Wilson*, 13 *Ves.* 87. *Cartwright vs. Cartwright*, 1 *Phillim.* 100. 1 *Eccl. Rep.* 47. But although the law recognizes acts done during such intervals, as valid, yet 'it is scarcely possible to be too strongly impressed with the degree of caution necessary to be observed in examining the proof of a lucid interval,' and such proof 'is matter of extreme difficulty, for this among other reasons, to wit: that the patient is not unfrequently rational to all outward appearance, without any real abatement of his malady.' *Sir John Nicholl* in *White vs. Driver*, 1 *Phillim. Rep.* 82. *Brogden vs. Brown*, 2 *Add.* 445. *Ayrey vs. Hill*, 3 *Add.* 210. 1 *Wms. on Ex.* 18.

In the case before cited of *Wheeler vs. Alderson*, *Sir John Nicholl* also says, 'When clear, decided and undoubted insanity has been established to have once existed before the contested transaction, acts otherwise of a doubtful character may become of more force, in proof of its existence at the time in question. Even acts of a decidedly insane character, occurring after the transaction, may reflect back upon acts otherwise equivocal, about the time of the transaction itself, or on the general deportment of the party.' Again, in *Groom vs. Thomas*, before cited, it having been proved and admitted, that the deceased had been actually insane before any testamentary act, *Sir John Nicholl* says, 'the question is whether before the testamentary acts he had recovered a sound and perfect mind? for becoming calm, so as no longer to require restraint and coercion, and being so far rational as to be

able to converse sensibly upon many or even upon most topics, will not be sufficiently conclusive. There are many persons decidedly lunatic, who yet have the entire dominion over themselves and their affairs, and pass in ordinary society as persons of perfectly sound mind.'

Again, in an after part of the same case, he says, 'there are many circumstances which, though not of themselves establishing actual insanity, which had not before become decided, are still strong *indicia* of its continuance; such as great irritability, violent passions, occasionally deep depression, eccentric habits, suspiciousness, inconsistency, changeableness and the like. If actual insanity never has existed, many or most of these circumstances may occur, and yet not establish positive derangement; but where actual derangement has previously existed, lighter things become confirmations; or as Swinburne, for another purpose expresses it, 'if there be but one word sounding to folly, it is presumed the testator was not of sound mind.' Further on he says, 'insane persons who have an object to effect, will often set about it with method, and in a manner apparently rational, it is difficult even for experienced persons to detect their insanity. A strong symptom of insanity is fluctuation of mind, unsteadiness, changeableness.' One more quotation. *Williams on Executors*, 29, quoting from doctor Willis' treatise on mental derangement.

'A sound mind is one wholly free from delusion. Weak minds again, only differ from strong ones in the extent and power of their faculties, but unless they betray symptoms of delusion, their soundness cannot be questioned.

'An unsound mind is marked by delusion, by an apparent insensibility to, or perversion of, those feelings which are peculiarly characteristic of our nature. Some lunatics for instance, are callous to a just sense of affection, decency or honour, they hate those, without a cause, who were formerly most dear to them; others take delight in cruelty; many are more or less offended at not receiving that attention to which their delusions persuade them they are entitled.

'Retention of memory, display of talents, enjoyment in amusing games, and an appearance of rationality on various subjects, are not inconsistent with unsoundness of mind; hence, sometimes arises the difficulty of distinguishing between sanity and insanity.' I have been full, perhaps tedious, in citing these authorities upon the subject of *general* insanity; I must still occupy a moment, in a few words as to *partial* insanity.

In the case of *Dew vs. Clark*, 3 *Add.* 93, 94, *Haggard's Rep.* 5, 10, *Sir John Nicholl* has these remarks: 'Derangement assumes a thousand different shapes, as various as the shades of the human character. It shows itself in forms very dissimilar, both in character and degree. Derangement exists in all imaginable varieties, from the frantic maniac chained down to the floor, to the person apparently rational on all subjects and in all transactions, save one, and whose disorder, though latently perverting the mind, yet will not be called forth, except under particular circumstances, and will show itself only occasionally. We have heard of persons at large in Bedlam, acting as servants in the institution, showing other maniacs, and describing their cases, yet being themselves essentially mad. It has probably happened to most persons who have made a considerable advance in life, to have had personal opportunities of seeing some of these varieties, and these intermediate cases between eccentricity and absolute frenzy. Maniacs, who though they could talk rationally, and conduct themselves correctly, and reason rightly, nay, with force and ability on ordinary subjects, yet on others, were in a complete state of delusion, which delusion, no argument or proofs could remove. This delusion may sometimes exist on one or two subjects, though generally, there are other concomitant circumstances, such as eccentricity, irritability, violence, suspicion, exaggeration, inconsistency, and other marks and symptoms which may tend to confirm the existence of delusion, and to establish its insane character.'

It was admitted in the argument, that this partial insanity would invalidate a will, which was the effect and creature of it; but insisted, that unless this connection could be shown, the will would be good.

We do not consider it material to this case to decide this question, as we think this will clearly connected with the morbid delusion. Let us look now to the facts in the record. It is proved by depositions taken by the plaintiff, that at different periods, long prior to the time of the contested will, Mr. Randolph had been deranged. Dr. Merry speaks of two attacks, one in 1810 or 1811, the other in 1814 or 1815. Mr. B. W. Leigh says, he was deranged in 1814 or 1815, when he had the correspondence with G. Morris; and again in 1820, after Decatur's death. William Leigh, says he was deranged in 1818, and in 1820. Dr. Dudley says the same. The derangement of 1818 was of a religious kind. Dr. Robinson says he was deranged from the same cause in 1819. In 1826 also, he is said to have been deranged.

The cases which I have cited, show that where a person has once or oftener, been insane before, lighter proof will establish the fact in any subsequent instance; and this is the language of reason too, for the fact of prior attacks shows a constitution and temperament predisposed, or at least liable to the disease. The conviction which a careful perusal of the record and an anxious examination of the case have forced upon us is, that from the time of his arrival home in November, 1831, to the last of April following, Mr. R. was essentially insane. We should incline to say, insane *generally*, if there were not some facts, (his letters, his drawing contracts, &c.) which show that on particular subjects, unconnected with the points of his insanity, he could express himself clearly and forcibly. We are decidedly of opinion, however, that during the period mentioned, he was *partially* insane.

The chief subject on which we think this morbid delusion existed was his slaves. Let us take up this subject first. It is proved by a great mass of testimony, uncontradicted by a single witness, that prior to his return from Russia, Mr. R. in all his intercourse with and treatment of his slaves, had been uniformly kind, considerate and humane, and this in an uncommon degree; that his negroes were strongly attached to him, and were very remarkable for their honesty and good behaviour. His feelings towards them are clearly evinced by his *acts* as well as his words. In his will of 1819, he emancipates them; in the will of 1821, he repeats this, and makes a large provision for them out of his estate; and to this will, so far as concerned their emancipation, he held steadily till his return home in the fall of 1831. In August, 1831, writing to Mr. Leigh, he desires to be kindly remembered to them all, and wishes that with a word he could make them white. To Marshall he said afterwards, that when he arrived at New York he would not have taken two thousand guineas, (or some large sum) for John or Juba, or the smallest one about the house. Up to this period, then we see that his feelings towards them were unchanged; of a kind, even an affectionate character.

On his arrival in this country he was met by the Southampton affair, and it seems to have made a deep impression, as he often spoke of it, and what execution he would have done upon the insurgents, if he had been among them, mounted on his horse Radical with a broadsword.

Whether this or what other cause effected the change in his feelings, it is impossible to say; but it is most clear that even before he reached his home, his feelings towards his slaves had changed from uncommon kindness to the utmost bitterness of hostility.

At Charlotte court-house, before he had gone home or seen his negroes, he told Robert Carrington, that he had intended to set them free, but remarked, 'they are such damned rascals and have stolen so much from me, that I will send them to New Orleans and sell them.'

Was this the decision of a sane mind? It was suggested that he had gotten information from Juba, and the boy who met him in Richmond; but would a man in his senses condemn three hundred slaves, who had before borne such an excellent character, on the tale of one of their fellows—unheard, unexamined? Or if he had formed a hasty opinion on this one-sided representation, would it not have yielded to the truth as disclosed to him on his arrival at home? For we have the clearest evidence that during his absence the negroes had behaved very well; one to be sure had stolen some wool, but had returned it before his master got home. There may

have been some other peccadillo committed by some one of them, which I do not now recall; but what was this, in a mass of three hundred?

Was it a cause in a sane mind, to turn the milk of human kindness into the very gall of bitterness? He returns home in this humour; and we find from those who visited him a few days after, that things went on from bad to worse.

The delusion taken up, that his slaves were doing him all the harm they could, wasting and stealing every thing—so far from yielding to truth and reason, was waxing stronger and influencing all his conduct towards them; and it is shocking and mournful to go into a detail of what followed.

Mr. Leigh, his most intimate and valued friend, visited him the day after he got home.

As soon as he saw him he was alarmed; there was something in his appearance and manner very extraordinary; he does not believe he had been drinking; he was constantly on his feet, searching every hole and corner of his house, and when he met his servants, cursing and abusing them, except John, with whom he had not yet fallen out.

Before he saw his plantations, complained of the management—said Leigh had spoiled his negroes by indulgence—was in great wrath with Billy, and with all his other slaves, because Billy had stolen some wool. Cradock, the overseer had recovered the wool by promising not to whip Billy; this enraged him very much, and he insisted that Cradock was a party in the theft.

They went to Billy's house, Mr. R. searched it; took away his tongs and hog, turned him out of the house, and quarrelled with him in such a manner as convinced Leigh he was not in his right mind.

During their ride they met other slaves, and Mr. R. uniformly spoke to them in the harshest manner.

Next day his manner the same, equally harsh and abusive to his servants, though they seemed to do all in their power to please him.

During this same visit a negro from the quarter came in, Mr. R. charged him with knowing about the wool; the negro was much frightened. He asked him if he was not a preacher; negro said he was—he cursed him, and told him if ever he heard of his preaching again, or even praying above his breath, he would give him nine and thirty. He then swore him on the Bible to answer questions, and took him into a private room, and kept him ten or fifteen minutes.

At this time Mr. R. spoke highly of Johnny, how faithfully he had served him, how honest; and said he owed more to him than to any one except his own mother.

He visited Mr. R. again the day after Prince Edward November court; got there before him; he and T. Miller came in the evening. He had not been drinking, for they had rode thirty miles, stopping only once for a short time. Mr. R. began at once to quarrel with and abuse his servants, Johnny as well as the rest—kept it up through the evening—spoke to Johnny and Queen of their intercourse, using the plainest words in the English language.

Look now at the evidence of Marshall. He saw J. R. at Charlotte court-house—passed the evening with him. He told him that Johnny had been not only a servant but a friend; had rendered him services no other man could—and used some strong language if he ever forgot him.

He visited him at home the same week; Mr. Leigh and Mr. Coalter were with him. He mentions Essex as an old servant of eighty, between whom and his master the most respectful and affectionate intercourse had always before subsisted.

Mr. R. called him daddy Essex. Whenever he left the room at night he wished his master good repose, which was always returned.

At this visit, soon after Marshall got there, Essex made his appearance, when Mr. R. flew into a violent passion—ordered him off, telling Johnny not to let him come where he was, as the very sight of him put him in a passion.

He says Mr. R's eyes had a peculiar and striking expression.

Marshall visited him again late in November. They rode out to a quarter, Mr. R. told him he meant to give all his negroes eastern and Turkish names.

They met one—he asked his name. Negro had forgotten it, (frightened, I presume, at the sight of his master.) It was made out after a while, and was Jugurtha.

The next negro they met was severely abused, because Mr. R. said he had furniture in his house good enough for a white man, and that he would drive him out; that he had tongs good enough for a gentleman's parlour, which he had, or would take from him.

Mr. Marshall saw him again at his own house late in December, and states conduct towards slaves still more revolting; but I cannot follow out the disgusting detail with the story of Syphax, &c.

Mr. Wm. M. Watkins, another intimate friend of long standing, says he saw him at the court-house and heard his speech—did not from that think him deranged, but visited him soon after, and from his conduct was satisfied that he was not in his right mind. He assigns his reasons for this opinion. Mr. R. he says, was always before kind and attentive to his slaves; that they were among the very best set of negroes he knew, and had behaved very well during his absence. At this visit Mr. R. told him his slaves had behaved very badly; that he had made a will freeing them, but would send them to New Orleans and sell them.

He abused his overseers; abused his friends, Leigh and Marshall in particular.

He repeated his visits from time to time, and thought he was still growing worse.

His house servants, the best in the country, were turned out, and field negroes taken in the house and to drive his carriage.

I could go on and detail the evidence of many others confirming these, and facts like these, but I will not. Nor will I detail the severe whippings given to Johnny, to whom he said he was more indebted than to any one but his mother; nor his violence to Essex and others, striking with a pole shod with iron; nor his having Queen carried out feet foremost as a corpse.

These facts, though after the will, may, according to the case cited, be resorted to as 'reflecting back.'

If what I have already stated be not enough to shew insanity as to his slaves, we cannot imagine what would.

To our minds it does decidedly shew that delusion, founded in a diseased imagination, which refuses to yield to truth, and fact, and reason.

If this has been established, it is then incumbent on those who seek to set up the will, to prove by clear and strong evidence a return to reason—such a return as the cases I have cited require. They surely have not done it by the evidence of witnesses, for it is clear from the whole stream of testimony that the disease went on increasing in violence till the last of April; always strongly characterized by that morbid and deadly hate to his slaves which we have already noticed. In the midst of the progress of this fearful disease was the will now propounded made. It has been attempted to shew that the conduct stated proceeded from excessive drinking. The witnesses who have testified are men of high standing for intelligence and character, were the intimate friends of Mr. R. and they state their conviction that such was not the fact. They were with him night and day, in the privacy of his chamber, and it seems impossible that he could have indulged in the excessive use of spirits without their knowing it; the very smell would have betrayed him. We give no weight therefore to this allegation; nor to the opinion of his overseers, that he was during this period sane. The facts speak for themselves.

But another, and we admit a stronger ground is taken. The will itself, wholly written by Mr. R. is relied on as conclusive proof of sanity and capacity; and other productions of Mr. R's (letters, contracts, &c.) are relied on as proofs of soundness.

We admit that a will sensibly written by a testator and with suitable provisions, is strong *presumptive* evidence of a sound mind, but deny that it is conclusive.

It must be remembered that we speak of partial not general insanity; the definition of which is that it affects the mind partially, leaving it sound on subjects beyond its range; where, as Erskine says, the eclipse is partial; where reason is not dethroned, but madness sits on her throne beside her.

Do not all the cases tell us that such persons upon many subjects exercise their minds with great strength? That they discourse eloquently and act in a manner apparently rational? Look at the men who baffled all the efforts of Lord Mansfield and Mr. Erskine to draw from them proofs of their insanity, till they obtained the key to it—did not these men discover as much mind, cunning, prudence and foresight as goes to the composition of a letter or a will? And yet they were confessedly insane.

But the case of *Cartwright vs. Cartwright*, is relied on. I think I can shew, that between that case and this there are some material and substantial differences.

In that case the testatrix was in confinement when she made her will, and at her earnest request her hands were loosed and materials given her to write her will. She wrote a sensible fair will, without 'a single note sounding to folly.'

A will giving her estate to her two nieces, the only children of an only brother of the whole blood, then dead, and to whom she had before, when undoubtedly sane, declared her preference. Two months after writing this will, in a conversation with the mother of the parties benefitted by the will, the testatrix mentioned that she had made such a will, ordered her servant to bring it, and she then delivered it to the mother, observing that there was no need of witnesses, as the estate was personal and the will in her own handwriting.

Under these circumstances this will was established. But how is it with the will before us? Does it conform to the long settled intention of the testator? No: in this respect it is wholly a new thought, *it breaks up from the foundation the whole scheme and plans of his former wills; it runs counter to the long continued and solemnly declared determination to exclude 'his mother's descendants,' (as he calls them in the will of* 1821,) *it cuts off his 'dear and bosom friend, Wm. Leigh, who for thirteen years had stood his chief legatee; and it violates all his solemn declarations to emancipate his slaves, and scruples of conscience expressed on that subject and so long adhered to.*

Of how much weight these changes are in a question of this sort, a few cases will be cited to show.

In *Frelleck vs. Allinson*, 5 *Eccl. Rep.* 188, it was considered as of great importance, as respected the sanity of the testator, that the will conformed to the long settled intention of the deceased, though that intention excluded his sister and other relations, with whom he had no cause of quarrel.

In *Dodge vs. Meech*, 3 *Eccl. Rep.* 270, Sir J. Nicholl, after stating at large the manner in which a former will had been made, adds—'here then is this disposition of his property, most deliberately made, and most firmly adhered to for five years.' (In our case it is twelve.) 'The court here, gathering his intentions from his own acts, and from these papers all in his own hand-writing, which speak much more decisively than mere depositions, can entertain no doubt what were his wishes; nor is there the slightest doubt that his faculties were unimpaired up to the first of January, 1834. To support a paper thus revoking and altering this will, and substituting a disposition quite different from and very opposite to it, would require the clearest and most indisputable evidence.' After stating the last will, he adds—'this then is a will completely the reverse of his former disposition, wholly abandoning its principle, and therefore requiring clear proof of capacity and execution.

Reference is also had to the case of *Brydges vs. King*, 3 *Eccl. Rep.* 109, as containing the same principle. Here then is one material difference between the cases. Again, in that case there was a most distinct and intelligent recognition of the will, and delivery of it to the mother of the legatees for safe keeping, and this two months after the making.

In our case what are the recognitions? He told Cardwell, he had told Bryan not to visit him; not that he had offended him, as he would see by his will at his death. This is at best but a very imperfect recognition; but the decisive answer to it is that it was either in December, 1831, or early in January, 1832, a period during which we think Mr. R. was clearly insane.

The same answer may be given to what he said to Griffin, that he had cancelled a will, and spoke of having made another. This was third January, 1832. And also to Harvey, to whom he spoke early in February, 1832, of his having torn his name off one will, and made another. And to Han-

nah, to whom he spoke in January, 1832, about having cancelled a will freeing his slaves and disposing of them otherwise.

Surely if the will itself is void because of the incapacity, any recognition during the same incapacity, would be equally ineffectual.

In June, 1832, he told Price he had made a will freeing his slaves, *but they had behaved so badly in his absence*, that he had altered his will, and had not or did not intend to free them. He thinks he was sane when he said this; and so he might be generally; but it is clear that he still cherished the delusion that his slaves had behaved so badly during his absence as to forfeit all claim on him, and so far he was clearly under the influence of his former insanity.

In this respect he resembles Mr. Greenwood, in the case of *Greenwood vs. Greenwood*, cited by Mr. Erskine in his defence of *Hadfield*, 27 *State Trials*, *p.* 1311. This gentleman, a barrister, in a fit of insanity, took up the idea that a most affectionate brother had administered poison to him. In a short time he recovered his senses, returned to his profession, was sound and eminent in his practice, and in all respects a most intelligent and useful member of society: but he could never dislodge from his mind the morbid delusion which disturbed it; and under the pressure, no doubt of that diseased prepossession he disinherited his brother.

Both Lord Thurlow and Lord Kenyon thought that this invalidated the will. So here the morbid delusion continued, the will executed under its influence has been declared void; a recognition under that same influence, therefore cannot add strength to it.

The last recognition that was relied on was that to Patillo. He says, 'I never heard Mr. R. speak of the contents of his will, or say that he had written one. He casually mentioned to me at one time the manner in which he *intended to dispose of his property*. It was in the winter of 1832–3, or the autumn preceding. Mr. Bryan was on a visit to him. He spoke of Mrs. B. very affectionately, as the daughter of a very dear sister, and said *it was his intention* that some of her issue should inherit his estate, or the principal part of his estate; I do not recollect the precise phrase. In continuation of the same remarks, he added a few moments after, that he *should select one* of her sons, and make a gentleman of him.' Now to our minds this, so far from being the recognition of an existing will, looks entirely to a future provision, and furnishes pretty strong proof that the will of January, 1832, was already forgotten.

This then is another important difference between the case of *Cartwright vs. Cartwright*, and the one before us.

The case of *Clarke vs. Lear & Seawell*, cited by Sir W. Wynne, 1 *Phillim.* 119, 1 *Wms. on Ex.* 23, is strong to show that a will, though wholly written by the testator, and sensibly expressed, does not afford conclusive proof of his sanity, for there 'although the instrument was written by the testator himself with great care and accuracy, yet it was made in favour of a person to whom he had no good cause whatever to give a benefit, it was held that the act of framing such an instrument furnished no proof of the existence of a lucid interval.'

I must not omit to state that while at Cardwell's, Mr. R. spoke to Mr. Marshall, more than once of the state of his mind while at Roanoke, during the winter before. He spoke of it as the time when he was mad at Roanoke, and to Patillo, he said two or three times, that he had been entirely deranged through the whole of the preceding winter. On one occasion, he said that he had been as mad during all that winter, as any patient ever in Saint Luke's hospital: and to Mr. Marshall, he wrote on 26th June, 1832. 'My dear Marshall—All my worst symptoms have returned—swelled legs and feet, burning palms of the hands, and all the horrors that I had (bodily and mental, and the last the worst of all) before I left Roanoke.' The authorities tell us that though this delusion may exist on one or two subjects only, yet generally there are concomitant symptoms, such as eccentricity, irritability, violence, suspicion, callousness to a just sense of affection, decency, or honour, &c. There is not one of these symptoms wanting in this case, decency, for instance. Every body knows how remarkable Mr. R. was when sane, for the chasteness and delicacy of his conversation, for his polished and genteel manners. Yet this record presents many instances of conversation

grossly obscene, at a public table, and before gentlemen at his own house; and this not from intoxication.

Irritability and violence.—The instances of these are too numerous to be stated; the record teems with them. Witness his seizing upon Cradock with a violence of manner and a countenance of rage, which Mr. Leigh tells us were indescribable, terrific. While Mr. L. was writing and Mr. R. dictating, L. looked once or twice at his watch; on his repeating it, Mr. R. leaped up, seized the tongs, threw them with violence into the chimney—raved like a madman till he was quite exhausted.

Suspicion.—I will cite but one instance of this, though many are at hand. Mr. Leigh and Mr. Marshall were his dearest, most trusted friends, and well deserving his affection and confidence; yet in the matter of the filly Whittleberry, sold at the precise price he had set upon her, he suspected them of having combined to defraud him.

Callousness to the sense of honour.—All who knew Mr. R. know that when himself, he was a man of the highest, nicest, most punctilious sense of honour. Yet in this dark hour he boasted to his friend Mr. L. of having won large sums of money, by betting on racehorses, under the guidance of Gully, a jockey, who was in the secrets of the turf, and knew what horses were by arrangement to win. A mere figment, no doubt, of his mad brain. A thing the very imagination of which he would have spurned, in his right mind.

I will follow this specification no further, though the record furnishes ample materials.

Upon the whole, we are unanimously of the opinion, that at the making of the will, January 1, 1832, that Mr. R. was of unsound mind, and that the will is void. We desire it to be distinctly understood, that we pronounce no opinion on any other point.

I deem the opinion of the eminent Dr. Parrish, of Philadelphia, (who was a witness in the cause,) as to the character and indications of '*mania à potu*,' as contradistinguished from madness, originating from other causes, as an addition to medical jurisprudence too important to be omitted.

Doctor Joseph Parrish, of Philadelphia, was affirmed.

Questioned by Mr. Jones.—Please state any other instance besides those mentioned in your deposition of the affection and confidence entertained by Mr. Randolph in his servant John, or in any other servant, and the extent of those feelings. *Answer.*—He appeared to have a very great regard for John, not a common regard—but I should say an affectionate feeling—and so far as I could observe reposed great confidence in him. *Ques.*—Was there any striking case in which those feelings were exhibited? Did he mention that John, or any of his other servants had accompanied him to Europe? Not clear in my recollection of his having said any thing about John having accompanied him to Europe—but clear as to his general feeling of kindness, respect and affection towards him. *Ques.*—In the course of your practice have not mental diseases fallen under your observation, and have you not had much experience in that class of cases? I have had a share of experience. *Ques.*—Are not the symptoms of insanity arising from constitutional causes, very different from these of derangement arising from intemperance? I regard mania a potu as entirely different from a common case of insanity, depending upon causes unconnected with intemperance. *Ques.*—Were there discernible in Mr. Randolph any indications of the existence of this disease of mania a potu? No. If it is desired by the court I will state—Mania a potu, is unhappily a disease in which the physicians of this country have ample experience—it is accompanied with peculiar timidity and dread; the patient imagines he sees thousands of objects around him which are about to injure him, he is pursued by persons, by officers of justice, perhaps, who are about to seize him. I believe, I may safely assert, and that I will be supported by the members of the medical profession, that if a physician was introduced into the chambers of a patient labouring under mania a potu, he would be able to decide that the patient had been an intemperate man without any previous knowledge of his case. *Ques.*—Are there not symptoms of physical derangement previous to the access of the disease of mania a

potu, which are within the reach of medicine, so as to prevent the access of that disease? There are—I can recite them. Perhaps the clearest way will be for me to cite a case. In our public hospitals it is very common for patients to be admitted with accidents—sometimes in the night, say with a broken leg—in going round in the morning it was common to find such a patient in a state of great nervous agitation—great tremor—unable to protrude his tongue in a natural way. It was the practice at once to adopt a plan calculated to tranquillize his nervous system by assafœtida, opium, &c. &c. Opium is the sheet anchor. *Ques.*—Is it not the case, that the tone of the mind is lost in cases of mania a potu? Always the tone is lost, it follows as a consequence. *Ques.*—On the other hand, is it not frequently the case that in a state of derangement some of the mental faculties remain unimpaired, and indeed, in all their vigour? Yes, that may be the case. *Ques.* Have you not observed that in cases of partial insanity, the insane persons exercise their faculties with most vigour and accuracy in relation to subjects and pursuits to which they are most accustomed when sane? No doubt that takes place in some cases. I know an eminent lawyer who was my patient in the Pennsylvania hospital, that from the correct manner in which he would expostulate with me on the subject of his confinement, I have no doubt could have addressed a court with great propriety on a legal subject, but if he had touched the rock of politics on which he split, he would have been perfectly wild.

By Mr. Johnson.—Are not attacks of mania a potu generally manageable? Generally, the attacks of mania a potu are manageable, if taken early. The disease arises from a sudden abstraction of stimulus to which the system has been accustomed. *Ques.*—Have you ever known the symptoms of mania a potu produced by the excessive use of opium? Although the habitual use of opium is pernicious, yet its influence on the system is not as injurious as ardent spirit. I do not at present recollect an instance of mania resulting from its sudden abstraction. Although I can believe that it may occur. *Ques.*—Did Mr. Randolph make use of opium while under your care in Philadelphia? Yes, my object was to soothe the patient. I had no idea of any radical treatment. I did not attempt to interfere with his habits—he took the sulphate of morphia, while I attended him at his own discretion. *Ques.*—Could you say from what you saw that he ever had been deranged from the use of opium? There was one night on which he appeared more under its influence than any other time. I visited him probably after his usual bed-time—he seemed dull and indisposed for conversation—an unusual fullness of the pulse indicated that he had taken more than usual. *Ques.*—Did you perceive any thing which led you to suppose that his mind had formerly been affected by the use of opium? Could not judge by any comparison with his past life, having only become acquainted with him at that late period. *Ques.*—Have you observed in cases of insanity, which leaves the faculties partially clear, that the mind becomes restored at the approach of death? I cannot speak positively, but in cases of recent disease, fever, for example, it is not uncommon for the mind to become clear before death.

By Mr. Stannard.—Had you never any intercourse with Mr. R. previous to his last visit to Philadelphia? I recollect to have seen him when congress sat in Philadelphia, but this was the first time I had any intercourse with him. *Ques.*—When you first saw him, did you consider him *in extremis?* Yes. I thought his case an extreme one, and that it would be likely to terminate in death in a short period, or a few days. *Ques.*—Did you perceive any fluctuations in his mind, while you attended him? The deposition shews that there were rapid transitions in his conversation. *Ques.*—I wish to know not whether he conversed not on various subjects, but whether you observed any fluctuations in the capacity or clearness of his mind? I think not—his capacity to decide on any question presented to him was uniformly good—after he roused from apparent sleep there would be at first a little confusion, but when his mind was brought to the subject and he comprehended it, he would give a clear answer. I believe there were no fluctuations as to the powers of his mind. *Ques.*—Were not the subjects very diversified on which he conversed. Yes. *Ques.*—Were they diversified by you to divert and occupy his mind? Sometimes, but he mingled many subjects without

my prompting. *Ques.*—Have you ever, in all your experience seen a man who talked so much, on so many subjects? I never have. *Ques.* Did you ever see any one who approached in any degree to Mr. Randolph? I have met with some very loquacious persons, but I think he exceeded them. *Ques.*—Have you ever met with so loquacious a dying man? I think I never did: he went beyond all others I ever saw. As my deposition states, I I never met with so original and unique a character. In society I never met with an individual whose conversation rapidly embraced such a diversity of subjects. *Ques.*—Have you any other reason for thinking him sound in his mind, than that on such subject he conversed on his remarks were sensible? That was the ground on which I judged, from the manner in which he spoke on every subject that was presented to him, I concluded that his mind was sound. *Ques.*—'Is it not often the case that some of the faculties of the mind are deranged, while on others it is sound and rational?' I presume the question is intended to stand thus: 'Is it not often the case that one or more faculties of the mind may be deranged while the patient may be sound and rational on many subjects?' Persons are sometimes deranged on particular subjects, while they appear sane and rational on general subjects. *Ques.*—Could you call a person in whom any particular faculty was defective, the faculty of memory for instance, insane. I do not consider defective memory an evidence of insanity. *Ques.*—Or would you call one insane who had lost the use of any of the senses.

Note.—Here several of the external senses were enumerated—hearing—seeing. *Ans.*—No. *Ques.*—Does that insanity of which you speak embrace the general power of exercising the judgment, or only those powers so far as some particular subject is concerned? The question I presume is intended to embrace cases of partial insanity, and, if desired, I can more clearly illustrate the subject by stating a case. I recollect a patient in the hospital who was known by the name of Queen Agnes, she fancied herself a queen, and decked her person with every bauble she could obtain—she appeared to enjoy the pleasures of royalty without the alloy attendant on the reality.

Note.—Here a question was put—in what faculty or part of the mind was the disease situated? In the judgment.

Note.—Some conversation arose between counsel and witness on this point involving the difference between cause and effect, or rather confounding effect with cause. The witness adhering to the position that the disease or defect was in the judgment. *Ques.*—If you drew her off from the particular subject of her madness to any other, would she not give a sane answer? Yes. *Ques.*—Then it was only as to her majesty that she was insane? Yes. So far as I can recollect, the point held up to view by the witness was, that in a case of partial insanity the actual condition of the patient might be so utterly at variance with the hallucination as to stamp it with absurdity and irrationality on its front. The case of Queen Agnes was intended to illustrate the position, while the eminent lawyer under my care in the hospital, gave evidence of high remaining powers of intellect shown by strong and rational appeals to the understanding, predicated on what he regarded an unjust and illegal confinement.

I have extracted from a very valuable (American) treatise, 'The Medical Jurisprudence of Insanity,' by Dr. Ray, a case of a will made by a testator labouring under monomania. He credits it to 1 *Little's Ken. Rep.* 371. I have not been able to procure the reporter. 'George Moore made his will in April, 1822, and shortly afterwards died. This will was contested. About twenty-four years before his death, he had a dangerous fever, during which he imbibed a strong antipathy towards his brothers, imagining that they intended to destroy or injure him, although they attended him throughout his illness, and never gave the slightest foundation for his belief.

This antipathy continued to the day of his death, with a single exception, when he made a will in their favour, which he afterwards cancelled.

When asked by one of the witnesses why he disinherited his brothers, he became violently excited, and declared that they had endeavoured to get his estate before his death.

The court in its decision observed, that he cannot be accounted a free agent in making his will, so far as his relations are concerned, although free as to the rest of the world. But however free he may have been as to other objects, the conclusion is irresistible, that this peculiar defect of intellect, did influence his acts in making *his will, and for this cause it ought not to be sustained.*

It is not only this groundless hatred or malice to his brethren, that ought to affect his will, but also his fears of them, which he expressed during his last illness, conceiving that they were attempting to get away his estate before his death, or that they were lying in wait to shoot him, while on other objects he spoke rationally; all of which are strong evidence of derangement in one department of his mind; unaccountable indeed, but directly influencing and operating upon the act which is now claimed as the final disposition of the estate.'

I do not deem it consistent with the respect due to the rights of others, to give the elaborate opinion of Chancellor Bland, of this state, delivered in the case of Colegate D. Owings, and reported in Bland's reports.

The individual (in that case) whose acts were submitted to judicial scrutiny, was, like Paulet, Marquis of Winchester, (the treasurer of Queen Elizabeth,) reported in Cooke's reports, *'multa provecta, senectute.'*

The Chancellor collects with his untiring industry, *all* the learning on this doctrine, sustained by references to sacred and profane writers, and illustrated and adorned by apposite and felicitous quotations from ancient and modern poets.

We have seen in the opinion of judge Washington and Lord Reddlesdade, that a much less testamentary capacity is required to make a will, than to make a contract. The act of 1798, chap. 101, sub chap. 1, sec. 1, and the opinion of the court of Appeals, delivered in the case of *Davis vs. Calvert,* (ante 45,) *partially* repudiates this distinction, and requires that the testator at the time of making a will of *real estate,* shall be not only of sound and disposing mind, but also *capable of executing a valid deed or contract,* or in other words, the last is the standard of that mental soundness and disposing capacity which the law demands as prerequisite to the making of a will of *real estate*; for the act of 1798, does not profess to meddle in the slightest degree, with wills of *personal property.*

APPENDIX.

CHAPTER XXXIII.—Directions concerning accounts and debts due to deceased persons.—*Page* 103.

Although the commentary and decisions of the courts are inserted in page 103, on the first and second sections of sub chap. 10, chap. 101, 1798—they are omitted in the body of the work—they are now inserted.

Directions concerning accounts and debts due to deceased persons.

1. In the account of an executor or administrator shall be stated, on one side, the assets which have come to his hands, according to the inventory or inventories returned to the court, or received and appraised as herein before directed after the inventory or inventories returned, and the sales which have been made under the court's direction; that is to say, the inventory or inventories are to shew the articles of the estate, and the sales the amount of their value, where they have been sold, and for articles so sold he shall be charged the price, according to the return; and if any article hath been sold for credit, and not yet paid for, it shall be accounted for in a subsequent account. 1798, *ch.* 101, *sub ch.* 10.

Directions concerning the settlement of accounts of executors and administrators.

Commissions.

2. On the other side shall be stated the disbursements by him made, viz: 1. Funeral expenses, to be allowed, at the discretion of the court, according to the condition and circumstances of the deceased, not exceeding three hundred dollars. 2. The debts of the deceased, proved or passed as aforesaid, and paid or retained. 3. The allowance for things lost, or which have perished without the party's fault, which allowance shall be according to the appraisement. 4. His commission, which shall be, at the discretion of the court, not under five *per cent.* nor exceeding ten *per cent.* on the amount of the inventory or inventories, excluding what is lost or hath perished. 5. His allowance for costs, and for extraordinary expenses, (not personal,) which the court may think proper to allow, laid out in the recovery or security of any part of the estate.—*Id.*

Meeting of creditors or representatives.

12. Any executor or administrator shall be entitled to appoint a meeting of creditors, or of persons entitled to distributive shares or legacies, or a residue, on some day by the court approved, and passage of claims, payment or distribution, may be there made, under the court's direction and control.—1798, *ch.* 101, *sub ch.* 14.

This last section will be read in connection with page 97.

I discovered, too late for insertion in their appropriate places, that I omitted to transcribe from my note-book the following addenda:

Case of *Blackstone vs. Blackstone*, 2 *Harr. & Gill*, 139. The principles of that case are these, to wit:

1. In an action on a testamentary bond, a plea, that since the last continuance of the cause, the orphans court of the county, which granted the letters testamentary, had revoked them, is no bar to the plaintiff's right of recovery.

2. Where letters testamentary or of administration have been revoked, pending the suit, the delinquent executor or administrator is deprived of no honest defence which should be made to the action. *Vide ante pages* 20 *and* 17.

3. If no assets have come to his hands, if he has administered them, if he has satisfied or on any ground be it unfounded in fact or law, it may be pleaded in bar to the action.

4. If there be debts outstanding, or paid, or if the property of the deceased has, under the order of the orphans court; been delivered over to a new administrator, it may be pleaded, not as a complete bar to any recovery, but it will confine the plaintiff to nominal damages or such other damages, as the court and jury, under all the circumstances of the case, shall think him entitled to recover; but if no new administrator has been appointed, judgment should be rendered, as if the letters testamentary had not been revoked. *Vide ante page* 17 *and* 24, *sec.* 7.

One of the principles (or rather reasons) adopted by the court in the case of *Watkins vs. State*, 2 *Gill & John.* 226, is this, that co-executors are regarded in law as an individual person; and by consequence, the acts of any one in respect to the administration of the effects, are deemed to be the act of all, for they have a joint and entire authority over the whole property. Hence a release of a debt by one of several executors is valid and shall bind the rest. *Vide ante page* 113.

Where property is delivered by the order of the orphans court to the securities on the administration bond, no suit can be brought on the bond by a creditor, 4 *Harr. & John.* 148. *State vs. Wright.* *Vide ante page* 18.

T. and M. in contemplation of marriage, agreed, that all property of the intended wife and estate of every description, to which she was then entitled, or that she might thereafter become entitled to, should be and was thereby conveyed to a trustee and his heirs in trust, for the use and benefit of the said M. and her heirs, without impeachment of waste, all which property to be under the exclusive control of the said M. and her heirs, without the interference of the said T. with power to the said M. to sell and dispose of the same by last will and testament, as if she was a feme sole, after the marriage and death of the wife without will. *Held*, that T. was not entitled to administration upon her estate. *Ward vs. Thompson*, 6 *Gill & John.* 349. *Vide ante page* 79.

I have examined the original bill of 1798, ch. 101, drawn by Chancellor Hanson, in 1797, published with the laws of that year, for the consideration of the people. The bill as published contained the following section.

'A widow shall be barred of her claim to dowry in the lands of the deceased, and all right to her share of the personal estate, by any marriage settlement, as heretofore, provided she was of the age of sixteen at the time of making it; and provided, in case she was above sixteen, and under the age of twenty-one years, at the time of making such settlement, that her father, mother, or guardian, be a party to such settlement.'

I laboured to trace the action of the House of Delegates on this section, without being able to discover any disposition of it. It seems that the house went into the committee of the whole on the bill, the chairman reported that various amendments had been adopted. The house acted on these amendments; what they were, no where appears on the votes and proceedings, and adopted them.

FEES OF REGISTERS OF WILLS.

6. *And be it enacted*, That from and after the commencement of the operation of this act, there shall be limited and allowed, to the registers of wills in the several counties of this state, instead of the fees heretofore prescribed and established by law, the following fees, which may arise or become due for services thereafter rendered, in virtue of their respective offices, and no more, viz: Fees of registers of wills.

For taking, entering, or endorsing, every probat of a will or testament, including all oaths necessary thereto,	$0 75
For granting letters testimentary, or of administration, letters *de bonis non* or *ad colligendum*, (whether one or more persons be included therein,) drafting, taking, filing, and recording bond, issuing warrant, with oath, to appraisers, and administering the necessary oaths to the person or persons to whom such letters may be granted, including all seals to letters and warrants to appraisers,	3 50
For transcript of a will, to be annexed to letters testamentary, or of administration, for every ten words or figures thereof, and so *pro rata*,	1
For drafting, taking and entering, the renunciation of a widow, executor, guardian or other person,	12½
For every certificate annexed to, or endorsed on, any paper or instrument not filed or recorded in the office, without seal, when so required,	8
For every search made for any matter or thing, above a year's standing, however remote or distant the period may be, if found,	18¾
For affixing the seal of office to any certificate, transcript, exemplification or other paper, if expressly required by law, or any person, but in no other case,	12½
For examining and passing every claim or voucher against a deceased person's estate, and endorsing certificate thereof, on every such claim or voucher, when passed by the court or register, for each,	12½
For stating and passing every account of an executor, administrator, collector or guardian, including all searches and references for that purpose, for every ten words and figures in said account, and so *pro rata*,	2
For every voucher against a deceased person's estate, or a minor, entered in each account so stated and passed, in addition thereto,	5
For entering and recording the appointment of a guardian, and approval of securities,	12½
For drafting, taking and filing a guardian's bond,	50
For taking, filing and recording, the recognizance or indenture of an apprentice, bound by the orphans court,	50
For recording an indenture of apprenticeship, executed out of the court, for every ten words or figures thereof, and so *pro rata*,	1

Fees of registers of wills.

For making out the balance and distribution of a deceased person's estate, including all searches and references for that purpose, ... 50

For every person named in said distribution, either as legatee, heir or creditor, in addition to that allowance, for each, ... 5

For exemplification of letters testimentary, without a copy of the will, or of administration, under seal of office. 75

For entering the appointment of persons to ascertain and report the annual value of the real or personal estate of minors, and issuing warrant, under seal, with probat thereon, ... 75

For issuing a second, or other warrant, under seal of office, for the appraisement of personal property or assets belonging to a deceased person's estate, with a probat thereon, ... 50

For writing and endorsing the probat to an inventory, or an account of sales, returned by an executor, administrator, or a collector, and also to the accounts stated of executors, administrators, collectors, or guardians, for every ten words or figures of such probat in either case, 2

For granting on parchment a certificate of freedom or pass, under seal of office, and recording or registering the same, without any additional charge for a search of will or testament, ... 1 00

For entering and recording an order of court for a sale of property, and a transcript thereof, under certificate and seal of office, ... 1 00

For entering an order of court to notify creditors to produce their claims, and a transcript thereof, under certificate and seal of office, ... 50

For issuing every citation or summons, special or common, under seal, whether one or more persons, not exceeding three, be included, ... 25

And for each person more than three, in addition thereto, 2

For issuing an attachment against one or more persons, under seal, filing, and entering return, and the order of the court thereon, whether the party appear or not, or whether he, she or they be fined, discharged on payment of costs or otherwise, ... 62½

For issuing order thereon to the sheriff, to bring the party or parties attached into court, under seal, filing and entering return thereon, ... 30

For issuing, under seal of office, a writ of execution or definitive sentence, a writ of sequestration, an attachment or decree, a *scire facias* against executors, administrators, guardians, or other persons, a *dedimus potestatum* to take answers on interrogatories or depositions, a commission to examine evidences, a commission or warrant to audit accounts, or marshal assets, or any other writ or process, not herein particularly enumera-

Fees of registers of wills.

ted and provided for, for every ten words or figures of either, and so *pro rata*, ... 1¼

For entering the personal appearance on process of, or the appearance of an attorney for, either or any party respondent, (but no charge is to be made for an appearance on the part of the state,) 5

For the entry of a continuance, or reference, on a libel, caveat, or any process by order of court, ... 5

For entry of the return of any citation, summons, writ of process, that may be issued, not herein particularly specified or provided for, ... 5

For every other entry, by order of court, on the citation, subpœna, or attachment docket, ... 5

For recording definitive sentence on plenary proceedings, for every ten words or figures thereof, and so *pro rata*, 1

For entering an appeal, with prayer and order in relation thereto, ... 12½

For taxing, making out, and filing a bill of costs of the parties to a petition, libel, caveat, or in any case of controversy, with the several items or articles at large, . 15

For a copy thereof, if demanded and delivered, . . 10

For taking and writing down deposition in court, for every ten words or figures written, and so *pro rata*, . 2

For entering interrogatories, for every ten words or figures written, and so *pro rata*, ... 1

For making out dockets for the orphans court, for every ten words or figures written, and so *pro rata*, . . 1½

For every oath or affirmation not herein before provided for, 5

For writing, preparing and taking probats of accounts, or other claims, against deceased persons estates, as authorized by the sixth section of the act of 1816, chapter 208, including the oath or affirmation necessary for that purpose, ... 12½

For filing every petition, libel, caveat, answer, replication, exhibits, or any other paper, matter, or thing whatever, necessary, or exhibited, and requested to be filed, to be charged but once, for each, ... 5

For every entry on the minutes of proceedings, by order of the court, other than on the citation, subpœna, or attachment docket, as above, and not herein before provided for, for every ten words or figures so entered, and so *pro rata*, ... 2

For recording or transcribing any will, inventory, account of sales, accounts of guardians, executors, administrators, or collectors, bonds, indentures, releases, receipts, or any other paper, matter, or thing, not herein before particularly enumerated, or provided for, if required by law, or requested by the party interested, to be recorded or transcribed, for every ten words or figures written, in either case, and so *pro rata*, ... 1

For alphabeting every instrument, proceeding, paper, or other matter, recorded in the office, and endorsing or

Fees of registers of wills.

entering thereon a certificate referring to the record, other than alphabets to the dockets of citations and attachments, ... 6¼

For any other services, matters, or things, not herein particularly specified or provided for, the same fees as are allowed and established for like or similar services provided for in this table or bill of fees.—1826, *ch.* 247.

An Act, to regulate the manner of giving public notice in cases required by law.—1826, *ch.* 178.

Publication of notices.

Be it enacted by the General Assembly of Maryland, That in all cases hereafter, when it shall be necessary, or be the duty of any court, or of the chancellor, or any judge, justice, commissioner or commissioners, auditor or auditors, acting under authority of law, to order or direct the publication of any notice, or other advertisement, in one or more newspapers, the said chancellor, court, judge, justice, commissioner or commissioner, auditor or auditors, shall direct the place or places in which such notice or advertisement shall be published, the number of papers in which it shall be inserted, and the number of insertions in each paper, but shall not name such paper or papers in such order of publication, but leave to the party, at whose expense such notice or advertisement is to be published, to select the paper or papers, in which the same shall be inserted, and to contract for the cost of such insertion and publication, any thing in any law, usage or rule, to the contrary notwithstanding: *Provided always*, that when such publication shall be ordered to be made in the city of Baltimore, it shall not be considered a compliance with such order, unless the notice or advertisement shall be inserted in one or more of the daily newspapers, as may be directed, published in said city.—*Vide* 94.

Proviso.

An Act, to permit Guardians, Executors, and Trustees, to bring slaves into this state, from any adjoining state or district, to hire and work, and not for sale.—1834, *ch.* 284.

Guardians, executors, and trustees authorized to bring in slaves.

Section 1. *Be it enacted by the General Assembly of Maryland*, That from and after the passage of this act, all guardians, executors, and trustees, heretofore or hereafter appointed, or any one of them residing in this state, appointed by last will and testament or otherwise, in this state, or any adjoining state or district, are hereby authorized and permitted to bring into this state, from any adjoining state or district, any slave or slaves, being slaves for life, confided to them in trust, and the same to hire out and work from time to time, for the benefit of the persons connected with the trust, and not for sale, and the same to remove back to any adjoining state or district at discretion, and back again to this state from any adjoining state or district: *Provided*, that a list of such slaves shall be made out by said guardian, executors, or trustees, or any one of them, within thirty days after their removal, and recorded in the clerk's office in the county to which said slaves may be, at any time, removed under this act.

Purpose only.

List and record required.

Sec. 2. *And be it enacted*, That no slave or slaves, brought into this state, under, and by virtue of this act, shall be entitled to freedom thereby, any law to the contrary notwithstanding. Freedom barred.

An Act to restrain the rigour of prosecutions on administration or testamentary bonds.—1720, *ch.* 24.

Whereas, it is represented by some of the justices of the provincial court, that a most oppressive and pernicious practice is introduced of putting testamentary and administration bonds in suit in the provincial court, for the non-payment of small debts recovered in the county courts, without ever suing out writs of *fieri facias*, or other executions to affect the estate of the deceased in the executors or administrators hands, or without any insufficiency of such executors or administrators, whereby the act, entitled 'an act to restrain the ill practices used by sheriffs in taking goods by *fieri facias*, and selling them by *venditioni exponas*, is entirely evaded, so far as it relates to executors and administrators, and the person and sureties of such executors and administrators are effected by such suing the said bonds, instead of the effects of the deceased; for prevention whereof for the future, Preamble.

II. *Be it enacted by the right honourable, the Lord Proprietary, by and with the advice and consent of his lordship's governor, and the Upper and Lower Houses of Assembly, and the authority of the same*, That it shall not be lawful for any creditor or creditors to prosecute any such administration or testamentary bond for any debt or damages due from or recovered against any testator or intestate, or their effects, before a *non est inventus* on a *capias ad respondendum* be returned against the executor or administrator, or a *fieri facias* returned *nulla bona* by the sheriff of the county where such executor or administrator live, or where the effects of such deceased lies, or such other apparent insolvency, or insufficiency of the person or effects of such executor or administrator, as shall in the judgment of the provincial court that hears the cause, render such creditors remediless by any other reasonable means, save that of suing such bonds, on pain that such person or persons that shall cause such bonds to be sued, contrary to the true intent and meaning of such act, shall be condemned in full costs of suit, to be adjudged by such provincial court to the defendant or defendants that shall be so sued, against the person or persons that shall cause the same to be sued, and shall award execution thereof as usual in other cases. No administration bond to be sued, &c.

III. *And be it further enacted, as aforesaid*, That it shall and may be lawful for the defendant or defendants in such suits to give this act and the especial matter in evidence, without specially pleading the same, any law, statute, usage or custom to the contrary notwithstanding. General issue pleadable.

The following report on the right of administration, was given to me by A. C. MAGRUDER, Esq. It will be read in connection with the fourteenth rule on page 79. It was misplaced, anxiously hunted for, and not found until it was too late to insert it in its appropriate place.

Calvert, administrator of *Cramphen vs. Robert G. Bowie and others*, decided at June term, 1836.

Cramphen left Mrs. Davis, a niece, and the appellee, the child of a nephew. Mrs. Davis renounced the administration, and recommended Calvert, the appellant, to whom letters were granted: the appellee, Robert G. Bowie, on behalf of himself and others, alleging themselves to be the next of kin, applied to the orphans court of Montgomery county, to revoke his letters. The court did so, on the ground, that the letters had issued without notice to the appellee and others, whom they considered as next of kin. The court of appeals reversed the decision, on the ground, that as the niece, Mrs. Davis, was entitled to the whole estate, that the appellee was not, in the meaning of the statute, the next of kin, and had no right to the administration.

TESTAMENTARY LAW OF THE DISTRICT OF COLUMBIA.

The act of Congress of the 27th February, 1801, declares, that the laws of Virginia and Maryland, as they now exist, shall be continued in force in the two counties in the District, as heretofore; the 12th section establishes an orphans court in and for the said counties, and gives the judges thereof, all the powers, and who are to perform all the duties which are exercised and performed by the judges of the orphans court, within the state of Maryland.

The following sections of the law of 1798, chap. 101, (which, being repealed by the act of 1802, chap. 101, are not in the body of this work,) are now reprinted, as being in force in Washington county, in the District of Columbia.

AN ACT for amending and reducing into system, the laws and regulations concerning last wills and testaments, the duties of executors, administrators, and guardians, and the rights of orphans and other representatives of deceased persons.—1798, *ch.* 101, *sub ch.* 8.

Plene administravit.

7. As in pleading it is extremely difficult for executors and administrators, as well as the opposite parties, to guard against error or mistake, which may operate unjustly against them, in no action, brought against an executor or administrator, shall it be necessary for him to plead *plene administravit*, or any thing relative to the assets, or for the plaintiff or plaintiffs to reply to such plea: *Provided nevertheless*, that any executor or administrator, sued in chancery, may be compelled, as usual, to say in his answer, whether or not he hath assets to answer all just claims against the deceased; and provided also, that if the said executor or administrator shall answer that he hath not assets as aforesaid, the proceedings shall be as they are at present; that is to say, an account may be taken of the assets under the direction of the court.

Judgments recovered against executors or administrators.

8. And if the verdict of the jury on the issue joined be against the executor or administrator, or if he shall be willing to confess judgment, and the debt or damages which the deceased (if he or she were alive) ought to pay, be ascertained by verdict, or confession or otherwise, the court, before whom the action was brought, shall thereupon assess the sum which the executor or administrator ought to pay, regard being had to the amount of assets in his hands, and the debts due to other persons; and if it shall appear to the said court that there are assets to discharge all just claims against the deceased, the judgment shall be for the whole debt or damages found by the jury, or confessed, or otherwise ascertained, and costs; and if it shall appear to the court that there are not assets to discharge all such just claims, the judgment shall be for such sum only as bears a just proportion to the amount of the debt, or damages and costs, regard being had to the amount of all just claims, and of the assets; that is to say,

as the amount of all the said claims shall be to the assets, so shall the amount of the said debt, or damages and costs, be to the sum required, for which judgment is to be given.

Court not to proceed to assess damages, provided executors make oath, &c.

9. And in no case shall the court proceed to assess as aforesaid, and to pass such judgment against an executor or administrator, until the time limited by law, or by the orphans court, for the executor or administrator to pass his account shall have expired; provided, that the said executor or administrator shall make oath, (or affirmation, as the case may require,) that he hath not assets to discharge all such just claims; and the account settled by the orphans court, in which the debt or damages sued for ought to be stated, shall be evidence to show the amount of assets and claims; and the court before whom the suit is brought against the executor or administrator for the recovery of a debt or damages, shall have power, when the real debt or damages are ascertained, to refer the matter to an auditor, to ascertain the sum for which judgment shall be given; and in case the judgment shall be for a sum inferior to the real debt or damage and costs, it shall go on and say, 'that the plaintiff be entitled to such further sum as the court shall hereafter assess on discovery of further assets in the hands of the defendant;' and the court, at any time afterwards, when applied to by the plaintiff, on three days notice to the defendant or his attorney, may assess and give judgment for such further proportionable sum as the plaintiff shall appear entitled to, regard being had as aforesaid to the amount of the debt, and other claims; and on any judgment passed as aforesaid, a *fieri facias* may issue against the defendant, and either his own goods, or the goods of the deceased, may be thereon taken and sold; and it shall be the duty of the executor or administrator to discharge the said judgment, or put it on a footing with other just claims, and on failure his administration bond may be put in suit by the plaintiff.

Judgments preferred to other claims.

17. In paying the debts of the deceased, an executor or administrator shall observe the following rules: Judgments and decrees against the deceased shall be wholly discharged before any part of other claims; after such judgments and decrees shall be satisfied, all other just claims shall be admitted to a distribution, on an equal footing, without priority or preference; if there be not sufficient to discharge all such judgments and decrees, a proportionable division or dividend shall be made between the judgment and decree creditors, but no executor or administrator shall be bound to discover what judgment or decrees have been passed against the deceased, unless in the high court of chancery, or the general court of the shore, or the court of the county, where the deceased last resided.

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